

Labour Law in Zimbabwe

Lovemore Madhuku

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LABOUR LAW
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LOVEMORE MADHUKU (b. 1966) has a Bachelor of Law (Honours) degree and an LL.B. from the University of Zimbabwe (UZ) and a Master of Law (LL.M) and Doctor of Philosophy (Ph.D) from the University of Cambridge. He completed his doctorate in December 1998. He has a permanent lecturership in the rank of full professor in the Law Faculty at the University of Zimbabwe where he teaches introduction to law, constitutional law, labour law, jurisprudence (legal theory), tax law and banking law, and has published extensively in these areas. He is currently Chairperson of the Department of Public Law in the Law Faculty. Between 1995 and 2013, he combined his full-time teaching at the University of Zimbabwe with work as a consultant for the Friedrich-Ebert-Stiftung (FES) on labour law and trade union issues.

One of the founders of the National Constitutional Assembly, which advocated for a new, democratic and people-driven constitution, Lovemore Madhuku was its chairperson from July 2001-2013.

He is married to Annamercy and the family has five children, two daughters, Tendai and Tapuwanashe and three sons, Nyasha, Kuziyakwashe and Tawanda.

CONTENTS

Acknowledgements

<i>Foreword</i>	<i>xiii</i>
-----------------	-------------

Chapter 1:

DEFINITION, PURPOSE AND SOURCES OF LABOUR LAW	1
---	---

Chapter 2:

HISTORY OF LABOUR LAW	11
-----------------------	----

Chapter 3:

THE CONTRACT OF EMPLOYMENT: FORMATION AND OPERATION	25
--	----

Chapter 4:

CONTRACT OF EMPLOYMENT: RIGHTS AND OBLIGATIONS OF THE PARTIES	54
--	----

Chapter 5:

TERMINATION OF EMPLOYMENT I. GENERAL	87
---	----

Chapter 6:

TERMINATION OF EMPLOYMENT II. TERMINATION UNDER THE MODEL CODE	113
---	-----

Chapter 7:

TERMINATION OF EMPLOYMENT III. TERMINATION UNDER CODES OF CONDUCT	146
--	-----

Chapter 8:

TERMINATION OF EMPLOYMENT IV. RETRENCHMENT	195
---	-----

Chapter 9:

TERMINATION OF EMPLOYMENT V. REMEDIES FOR UNLAWFUL TERMINATION	231
---	-----

<i>Chapter 10:</i>	
FREEDOM OF ASSOCIATION AND THE RIGHT TO ORGANIZE	274
<i>Chapter 11:</i>	
COLLECTIVE BARGAINING	319
<i>Chapter 12:</i>	
DISPUTE SETTLEMENT	
I. CONCILIATION AND ARBITRATION	350
<i>Chapter 13:</i>	
DISPUTE SETTLEMENT	
II. ADJUDICATION IN THE LABOUR COURT AND THE SUPERIOR COURT	389
<i>Chapter 14:</i>	
DISPUTE SETTLEMENT	
III. THE RIGHT TO STRIKE	427
<i>Chapter 15:</i>	
STATE EMPLOYMENT	475
<i>Chapter 16:</i>	
SOME ASPECTS OF SOCIAL SECURITY	488
<i>Chapter 17:</i>	
INTERNATIONAL LABOUR LAW	502
<i>Appendices:</i>	
PART 1: FUNDAMENTAL (CORE) ILO CONVENTIONS	522
PART 2: CONVENTIONS RATIFIED BY ZIMBABWE	524
THE CASE LIST	526
<i>Bibliography</i>	563

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Lovemore Madhuku
April, 2015

FOREWORD

The Friedrich-Ebert-Stiftung (FES) is a German political foundation that was established in 1925 to promote civic and political education of workers. For 90 years its backbone has been the promotion of the ideas and values of social democracy across the world. It carries out its mission through its programmes of civic education, research, the strengthening of democratic institutions and support of programmes that promote social justice.

The FES has been engaged in Zimbabwe since 1980. Its main focus is to support democratization processes and promote public debate on social, economic and political issues.

The FES support for this publication emanates from its work with trade unions under the auspices of the Zimbabwe Congress of Trade Unions. Professor Lovemore Madhuku's work with the FES for 18 years involved co-ordinating a paralegal training programme and facilitating the involvement of trade unions in social policy formulation, including labour law reform.

It is hoped that this book, together with its predecessor, *An Introduction to Zimbabwean Law*, will play a role in the development of labour law in Zimbabwe, particularly by encouraging a social justice thrust of labour law in the light of section 65 of the Constitution of Zimbabwe.

Brigitte Juchems
Resident Director,
Friedrich-Ebert-Stiftung,
Zimbabwe
April, 2015

CHAPTER ONE

DEFINITION, PURPOSE AND SOURCES OF LABOUR LAW

What is labour law?

In a narrow perspective, labour law refers to the collection of legal rules which govern the employment relationship. In a broad sense, labour law covers not only the rules which govern the employment relationship but also embraces the rules regulating the existence and operation of all the institutions of the labour market, such as trade unions, employers' organizations, the State in its dual capacity as employer and regulator and the labour dispute resolution entities.

The following statement from Deakin and Morris aptly captures the scope of labour law:

Labour law stems from the idea of 'subordination of the individual worker to the capitalist enterprise'; it is above all, the law of dependent labour, and hence is specific to those categories of economic relationship which in some way involve the exchange of personal service or services for remuneration. Labour law is concerned with how these relationships are constituted, a role which in common law systems is accorded primarily to contract, and with how they are regulated, a role shared by the common law and social legislation but also by extra-legal sources such as collective bargaining and workplace custom and practice. Its scope accordingly extends from the individual to the collective, from the con-

*tract of employment to relations between the institutions of organised labour and capital and to the conduct and resolution of conflicts between them.*¹

The element of ‘subordination’ appears central to the scope of labour law. Other leading authors have said:

*Labour law is concerned with ‘labour or work’ which is done in a position of subordination, that is, when an employee works under the command, the authority and the control of an employer, when the work is not carried out in a position of subordination, as in the case of self-employment, labour law does not apply. If work is done in such a position, the employee enjoys the full protection of labour law and of social security... Labour law can thus be described as the body of rules which governs the relationship between employers and employees who carry out their labour or work in a subordinate position.*²

A distinction should be made between individual labour law and collective labour law. The former deals with the law regulating the individual relationship between the employer and employee, while the latter covers the law regulating the collective relations in the labour market, such as that between an employer and a trade union or a group of workers or that between a group of employers (or employers’ organization) and a trade union.

Purposes of Labour Law

Labour law has two main purposes:

- To perform the social function of protecting employees from the full operation of market forces through creating a minimum floor of rights for employees, such as maximum hours of work, protection from unfair dismissals and minimum wages. This is a social justice purpose. Some authors have expressed this purpose in the following words:

The traditional purpose of labour law is to protect employees from encroachments on their personal life, from economic disadvantages and from health risks associated with the

1 Deakin and Morris (1995) p. 1.

2 Blanpain and Engels (1996) p. 28.

*exercise of a particular job. Past experience has shown that contractual freedom of employer and employee and the responsibility of the employer for the safety and health of his employees do not guarantee the social and health-related protection that is required.*³

- To balance the inequality of bargaining power inherent in the employment relationship by facilitating the operation of organized labour as a countervailing force to capital. In this regard, labour law facilitates the operation of workers organizations, sets out the framework for collective bargaining and creates a platform for the withdrawal of labour as a countervailing tool in the hands of organized labour.

Sources of Labour Law

Like any other branch of law, labour law is found in four main sources, namely legislation (statutes), common law, custom and authoritative texts. Brief statements on each of these sources are relevant.

Legislation (statutes)

Legislation is the most extensive source of labour law in Zimbabwe. Legislation as a source of labour law comes in four forms: the Constitution, Acts of Parliament, delegated legislation and international legal instruments.

The Constitution

The Constitution is the supreme law of Zimbabwe and any law inconsistent with it is invalid.⁴ The obligations imposed by the Constitution are binding on every person.⁵ Several provisions of the Constitution are part of the labour law of the country. The most significant provisions are in Chapter 4 (Declaration of Rights) and include freedom from forced or compulsory labour,⁶ equality and non-discrimination,⁷ freedom of assembly and association⁸ and freedom of profession, trade or occupa-

3 Halbach et al. (1991) p. 25.

4 Section 2(1) of the Constitution of Zimbabwe, 2013.

5 Section 2(2) of the Constitution of Zimbabwe, 2013.

6 Section 55.

7 Section 56.

8 Section 58.

tion.⁹ Above all, section 65 provides for labour rights in the following manner:

1. Every person has the right to fair and safe labour practices and standards and to be paid a fair and reasonable wage.
2. Except for members of the security services, every person has the right to form and join trade unions and employee or employers' organizations of their choice, and to participate in the lawful activities of those unions and organizations.
3. Except for members of the security services, every employee has the right to participate in collective job action, including the right to strike, sit in, or withdraw their labour and to take similar concerted action, but a law may restrict the exercise of this right in order to maintain essential services.
4. Every employee is entitled to just, equitable and satisfactory conditions of work.
5. Except for members of the security services, every employee and employer has the right to –
 - a. engage in collective bargaining;
 - b. organize and form or join federations of such unions and organizations.
6. Women and men have a right to equal remuneration for similar work.
7. Women have a right to fully paid maternity leave for a period of at least three months.

The impact of Chapter 4 of the Constitution on any other law is extended by section 46(2), which requires every court, tribunal, forum or body to promote and be guided by the spirit and objectives of the Bill of Rights when interpreting any enactment. This provision is of particular relevance to the Labour Court and arbitrators when interpreting labour legislation.

In its own words, section 46(2) provides:

When interpreting an enactment, and when developing the

⁹ Section 64.

common law and customary law, every court, tribunal, forum or body must promote and be guided by the spirit and objectives of this Chapter.

Outside Chapter 4, the Constitution has numerous and detailed provisions regulating employment by the State. These include the Civil Service,¹⁰ conditions of service and tenure of members of the judiciary,¹¹ security services,¹² conditions of service of employees of independent Commissions,¹³ the clerk and other employees of Parliament,¹⁴ and the conduct of employees of provincial and local government.¹⁵

Acts of Parliament

The principal Act of Parliament in labour law is the Labour Act [Chapter 28:01]. This Act applies to all employers and employees ‘except those whose conditions of employment are otherwise provided for in the Constitution’.¹⁶ The main group of employees ‘whose conditions of employment are otherwise provided for in the Constitution’ is that of members of the Civil Service. There are two pieces of legislation covering this group, namely the Public Service Act [Chapter 16:04] and the Health Service Act [Chapter 15:16].

Section 3(3) of the Labour Act [Chapter 28:01] is specific about its non-application to members of the disciplined forces of the State or members of any disciplined force of a foreign State who are in Zimbabwe under an agreement to which Zimbabwe is a party and to any other employees of a State designated by the President through a statutory instrument. For all employers and employees covered by the Labour Act, any other piece of legislation which may apply to them only has validity if it is consistent with the Labour Act. This is by virtue of section 2A(3) which provides:

This Act shall prevail over any other enactment inconsistent with it.

The impact of this provision is that other pieces of legislation may regulate labour matters to an extent not inconsistent with the Labour Act.

10 Chapter 10.

11 Chapter 8, Part 2.

12 Chapter 11.

13 Chapter 12, section 234.

14 Chapter 6, section 154.

15 Section 266.

16 Section 3(1) of the Labour Act [Chapter 28:01]

For example, provisions regulating labour matters in the Urban Councils Act [Chapter 29:15] are valid as long as they are not inconsistent with the Labour Act. This provision has put to rest the controversy about whether or not the Labour Act is superior to other pieces of legislation on labour matters. The controversy had arisen in matters involving local authorities and public bodies and enterprises.

The main problem was that the relevant Act contained provisions purporting to provide for conditions of service of employees and termination of employment. Were such provisions overridden by the Labour Relations Act which was the title of Labour Act until it was changed in 2003? As regards parastatals, the High Court was for some time divided over the issue. In *Nyakanyanga v Postmaster-General*,¹⁷ Gibson J held that section 3 of the Labour Relations Act did not impliedly repeal section 20 of the PTC Act, which gave the corporation power to, inter alia, 'appoint, upon such terms and conditions as the Board may deem fit, and to suspend or discharge any such persons.' Accordingly, the Labour Relations Act did not apply to the PTC.¹⁸ This view was rejected by Smith J in *Masasi v PTC*¹⁹ who held that section 3 of the Labour Relations Act was clear enough to be a modification of the PTC Act.

The Supreme Court finally settled the issue in *Gumbo v Norton-Selous Rural Council*.²⁰ In that case, the appellant, who was an employee of the respondent, had been dismissed in terms of section 62(3) of the then Rural Councils Act.²¹ The Labour Relations Act had not been followed. Section 62(3) empowered the council to terminate employment on three months notice if a resolution to that effect had been passed by a majority of the councillors entitled to sit on a council. The employee argued that the dismissal was unlawful because the council had not complied with the Labour Relations Act. On its part, the employer (the council) contended that the Labour Relations Act did not apply because it did not override the procedure specifically set out in the Rural Councils Act.

The Supreme Court held that in deciding whether the Labour Relations Act applied to an institution set up by statute, the specific wording of the relevant statute had to be examined to see whether or not it over-

17 HH 19/1989.

18 See also *Musendekwa v Posts and Telecommunications Corporation* 33/1991.

19 1991 (2) ZLR 73(HC).

20 1992 (2) ZLR 403(S).

21 Chapter 211.

rode the Labour Relations Act. The issue was one of statutory interpretation. In that case, it was held that section 62(3) of the Rural Councils Act merely gave the rural councils the powers that ordinary common law employers already had and did not override the Labour Relations Act. The dismissal was therefore held invalid for failure to comply with the Labour Relations Act.²²

In *Matamisa v City of Mutare*²³ the High Court was called upon to determine whether the dismissal of a town clerk in terms of section 139 of the Urban Councils Act was valid. Chinhengo J held that section 139 had not overridden the Labour Relations Act and therefore the latter applied to the termination of employment by urban councils. On appeal this decision was reversed by the Supreme Court in *City of Mutare v Matamisa*²⁴ where it was held that section 139 overrode the Labour Relations Act in that, had the Legislature required further approval in addition to that of the Local Government Board, it would have said so. As this decision related solely to section 139, which dealt with town clerks and other senior employees, it left the question open regarding junior urban council employees whose termination was governed by section 141. In *City of Mutare v Fanuel Mudzime and Others*,²⁵ the Supreme Court reached a conclusion similar to that in the *Matamisa* case. It held that had the Legislature intended the Labour Relations Act to apply in addition to the procedure set out in section 141, it would have said so. The absence of that express reference meant that the Labour Relations Act did not apply.

The Labour Act applies to contracts of employment between international organizations and their employees because, as a general rule, immunity from suit and legal process does not extend to an act *jure gestionis* (of a private law character) such as a contract of employment. Immunity only extends to an act *jure imperii* (a sovereign or public act).²⁶

Delegated Legislation

Delegated legislation is promulgated in the form of statutory instruments. Two types of delegated legislation are sources of labour law:

²² See also *Mukundu v Chairman, Mutasa RDC* 2002 (1) ZLR 469 (S).

²³ 1997 (2) ZLR 122(H).

²⁴ 1998 (1) ZLR 512(S).

²⁵ SC 91/1999.

²⁶ See *The International Committee of the Red Cross v Phyllis Sibanda & Munyama Ngangura* SC48/03.

direct and indirect. Direct delegated legislation refers to statutory instruments made by the Minister in terms of an enabling labour statute such as the Labour Act or the Public Service Act. There are several statutory instruments in this category that have substantive labour law provisions. These include Labour Court Rules, 2006 (SI 59/2006), Labour (National Employment Code of Conduct) Regulations, 2006 (SI 15/2006), Labour (Settlement of Disputes) Regulations, 2003 (SI 217/2003), Labour Relations (HIV and AIDS) Regulations, 1998 (SI 202/1998), Public Service Regulations, 2000 (SI 1/2000) and Health Service Regulations, 2006 (SI 117/2006). Indirect delegated legislation refers to collective bargaining agreements. In terms of the Labour Act, a collective bargaining agreement attains a legal and binding effect after registration.²⁷ On publication as a statutory instrument, a collective bargaining agreement attains the same legal status as any other delegated legislative instrument. Its provisions automatically bind the relevant employers and employees and render void any contractual stipulations inconsistent with it.

International labour instruments

The main international labour instruments are the Conventions and Recommendations of the International Labour Organization (ILO). In the ILO system, Conventions are a form of legislation binding on Member States that ratify them. Some Conventions, called 'core conventions', bind every member of the ILO, regardless of ratification. Recommendations are not binding but act as guidelines for Member States. International labour instruments are not automatically part of our labour legislation. To be part of our law, such an instrument must be incorporated into the law through an Act of Parliament.²⁸ However, in the absence of incorporation through an Act of Parliament, international labour instruments are a source of labour law in two respects. First, they may be referred to as evidence of customary international law, which is part of the law of Zimbabwe unless it is inconsistent with the Constitution or an Act of Parliament.²⁹ Almost all 'core' conventions of the ILO are evidence of customary international law. Secondly, it is now mandatory for every court and tribunal, when interpreting legislation, to adopt any reasona-

27 Section 80(2) of Labour Act [Chapter 28:01].

28 Section 327 (2)(b) of the Constitution of Zimbabwe, 2013.

29 Section 326 (1) of the Constitution of Zimbabwe, 2013.

ble interpretation which is consistent with both customary international law and any international convention, treaty or agreement which is binding in Zimbabwe.

Common Law

The common law is that portion of the law that is not derived from legislation and emanates from a collection of legal rules and principles made by judges in the course of resolving issues brought before the courts.³⁰ In Zimbabwe, the common law is not exclusively based on judicial precedent. It also includes principles of law derived from Roman-Dutch law (a fusion of Roman law and medieval Dutch law which occurred in Holland over a considerable period but had ended by the close of the sixteenth century) and English law. Roman-Dutch law not already reflected in judicial precedent is found in the writings of the old Dutch jurists such as Voet and Grotius.

Zimbabwe's legal history has led to a state of affairs where its common law is made up of judicial precedent (built on the principles of Roman-Dutch law and elements of English law) and that portion of Roman-Dutch Law not reflected in previous cases. Notwithstanding the dominance of legislation, the common law still constitutes a substantial portion of labour law in Zimbabwe. The Constitution requires the courts, when developing the common law, to do so with a view to promoting the spirit and objectives of the Bill of Rights.³¹ In the field of the assessment of damages for unlawful dismissal, common law principles have reigned supreme.³²

The courts have held that the common law can only be altered by explicit provisions of the Labour Act or other legislation.³³ Thus, section 2A of the Labour Act which sets out the broad objectives of the Act and states that the Act prevails over any other Act inconsistent with it is not a wholesale alteration of the common law.³⁴

The Constitution gives the Constitutional Court, Supreme Court and High Court inherent power to develop the common law, taking into ac-

30 See Madhuku (2010) pp. 15-25.

31 Section 46 (2) of the Constitution of Zimbabwe, 2013.

32 See Chapter 8.

33 *Hama v NRZ and United Bottlers v Kaduya* 2006(2) ZLR 150(S).

34 *United Bottlers v Kaduya*.

count the interests of justice and the provisions of the Constitution.³⁵ If this jurisdiction is exercised vigorously, many common law rules in labour law will give way to the principles of fair play arising from section 65 of the Constitution. For example, termination on notice for no reason and without giving the employee an opportunity to be heard cannot survive. The South African Supreme Court of Appeal has exercised similar jurisdiction to develop the common law to incorporate an implied contractual right not to be unfairly dismissed.³⁶

Custom

A custom is a rule that has become binding in the course of time by virtue of habitual observance. A custom is legally binding if it satisfies four requirements, namely if it is reasonable, long-binding, certain and uniformly observed.³⁷ Custom has little impact as a source of labour law. However, some customs at a workplace or in an industry may become a basis of legal rules. A custom may also be referred to in the interpretation of a collective bargaining agreement.

Authoritative Texts

The views of leading authors and commentators on labour law are a very persuasive authority where neither legislation nor case law is directly in point. The persuasive nature of an opinion depends, *inter alia*, on the standing of the author, the reputation of the author among judges, the scholarly level of the piece of work involved and the degree to which the nature of the presentation is convincing.³⁸

35 Section 176 of the Constitution.

36 See *Old Mutual Assurance Co. SA v Gumbi* (2007) 8 BLLR 699 (SCA); and *Boxer Superstores, Mthatha & Anor v Mbenya* (2007) 8 BLLR 513 (SCA).

37 Madhuku (2010) p. 25.

38 Madhuku (2010) p. 32.

CHAPTER TWO

HISTORY OF LABOUR LAW

Introduction

The history of labour law in Zimbabwe effectively begins with the colonial occupation of the territory. Before colonialism, the feudal economy of the various kingdoms and territories that constituted what is now Zimbabwe, had no wage labourers so there could be no law regulating the rendering of services in return for wages.

It has been said that:

The contract of employment moved towards the centre of the legal stage only with the advent of capital and large scale employment in factories. Before that Blackstone assigned the contract of employment to the law of domestic and family relations.¹

In February 1888, Lobengula signed the Moffat Treaty, in which he is said to have agreed that ‘he would refrain from entering into any correspondence or treaty with any foreign State without the previous knowledge or sanction of Her Majesty’s Commissioner of South Africa’.

The importance of this Treaty was that it provided a shaky ‘legal basis’ for British penetration of Zimbabwe. Later, Lobengula sealed this ‘legal basis’ by signing the Rudd Concession where he is said to have agreed to grant Cecil Rhodes and his people ‘the exclusive charge over all metals and minerals situated and contained in my Kingdom and principalities,

1 Grogan (1998) p. 3.

together with full power to do all things they may deem necessary to win and procure the same’.

This last phrase was taken to give Rhodes some power to exercise Governmental control. By necessary implication, the ‘full power to do all things ... necessary to win and procure’ minerals included the power to promulgate labour laws for the regulation of working conditions in mines.

In October 1889, the British Government granted a Royal Charter to Rhodes’ Company, the British South African Company (BSAC). Armed with the Charter, the BSAC occupied Zimbabwe in September 1890. The Charter gave the Company the power to administer the territory and establish Governmental power.

Under the scheme of the Charter, laws were to be made in two main ways:

- (a) By Ordinances promulgated by the Secretary of State in Britain on the advice of the Board of directors of the BSAC. Effectively these Ordinances were initiated by the Company.
- (b) By Proclamations issued by the High Commissioner at the Cape.

After the defeat of Lobengula in 1894, a third mechanism of lawmaking was added, namely the making of Regulations by the Administrator.

First Component of Labour Law: Proclamation of 10 June 1891

On 10 June 1891, the first important instrument relevant to labour was promulgated. This was a Proclamation by the High Commissioner at the Cape which provided that the law to apply in Zimbabwe was to be the law applying at the Cape of Good Hope as at that date.

The main significance of the Proclamation was that it introduced the common law applying at the Cape as the common law of Zimbabwe. That common law was largely Roman-Dutch but it also had English law elements. This meant that the courts were empowered to refer to Roman-Dutch Law and to some aspects of the English common law.

The Proclamation also meant that Cape statutes in existence on 10 June 1891 automatically became part of the law in Zimbabwe.

Second Component of Labour Law: Hut Tax Ordinance of 1894

The next set of law was concerned with ensuring that Africans would

have no option but to seek wage employment.

The Hut Tax Ordinance of 1894 (Ordinance No 5 of 1894) imposed a hut tax on African residences on what was termed Crown land. As noted by the Colonial Office:

The usual inclination is to kill two birds with one stone, ... to appropriate land with a view to starving the natives into working for the white expropriators.

The idea was to force Africans to seek wage employment. Although the Ordinance was opposed by some sections of the Colonial Office, it became operational at the end of 1894. There was heavy resistance by Africans leading to the First Chimurenga of 1896-97.

Third Component of Labour Law: Public Service Regulations, 1898

With the growth of the Governmental apparatus after the defeat of Africans in 1897 and the enactment of the Southern Rhodesia Order in Council of 1898, a civil service of some sort emerged. It was therefore necessary to regulate work in the civil service and this was done thorough the Civil Service of Rhodesia Regulations, 1898. The main purpose of the Regulations was to create a Civil Service, and they provided for the following:

- (a) all persons appointed by the Administrator (except Judges of the High Court) were to be regarded as members of the Public Service;
- (b) persons were to be appointed firstly on probation for at least 12 months and thereafter could be permanently employed. The probationary period was not to be longer than 18 months;
- (c) the power to make or unmake the rules regulating Public Service employment was vested in the Administrator;
- (d) drunkenness was a serious act of misconduct and a person could be dismissed from the Public Service for 'habitually using intoxicating liquor to excess'.

Fourth Component of Labour Law: Natives Employment Ordinance, 1899

The purpose of this Ordinance was to control the recruitment of African

labour with a view to ensuring that African workers were not taken out of the territory for employment in other territories. There was now a heavy demand for labour and it had become big business to be involved in the recruitment of workers.

The Ordinance required the licensing of any person who wanted to act as a recruitment agent for African employees. It prohibited the recruitment of Africans for work outside the territory and made it a criminal offence to contravene its provisions. It was later repealed by the Native Labour Regulation Ordinance, 1911, the major purpose of which was to improve, and make more severe, the restrictions on the recruitment of African workers for work outside the territory. It also introduced a system of labour inspections whereby the Administrator was empowered to appoint inspectors to inquire into any grievances by natives. The inspectors were also required to 'enquire into and determine all breaches of discipline by any native labourer'.

Fifth Component of Labour Law: Master and Servants Ordinance, 1901

This was the first substantive piece of legislation dealing with rights and duties of employers and employees. It applied to the individual employment relationship and did not cover collective labour relations.

Its definition of a 'worker' – described as 'servant' – included both whites and blacks and was as follows:

Any person, whether of European or Native or other origin, employed for hire, wage, or other remuneration to perform any handcraft or other bodily labour in domestic service, mining, agriculture, trade or manufacture.

Although the Ordinance did not distinguish between races and covered all workers, its enumeration of the various types of work in the definition of 'servant' meant that Government workers were not covered. These remained under the 1898 Regulations.

The main provisions of the Ordinance were (i) that a written contract of employment could not exceed three years, (ii) the period of notice to terminate a contract was generally one month, (iii) a married woman could not enter into a contract of employment without the consent of her husband, (iv) there was paid sick leave of one month, and (v) more fundamentally, it criminalized breaches of the employment contract. It was

a criminal offence for a worker to commit any of the following forms of misconduct at the work place:

- (a) refusal to commence duties at the time stipulated;
- (b) absence from work without lawful excuse;
- (c) becoming intoxicated during working hours;
- (d) disobedience to a lawful command.

Interestingly, conviction under the Ordinance did not have the effect of cancelling the contract of employment. In terms of section 3 of Chapter 4 of the Ordinance:

the servant or apprentice shall be bound to return to his Master immediately after having complied with the terms of his punishment in order to serve the unexpired period of his service.

Sixth Component of Labour Law: Industrial Dispute Ordinance, 1920

Up to the enactment of this Ordinance, no attempt had been made to regulate collective labour relations. The law had been concerned with the recruitment of workers and the regulation of the individual contract of employment. But by 1920, workers were becoming an organized group and labour disputes had become inevitable. Accordingly, some dispute resolution mechanisms had to be put in place.

The purpose of this Ordinance was to provide a system of dispute settlement. It was only concerned with disputes of a collective nature. It was targeted at the white working class, although this was not said in the Ordinance.

It provided for the creation of conciliation boards appointed by the Administrator. These were tasked with resolving disputes referred to them by the Administrator. The focus was mainly wage disputes and this Ordinance suggests that some system of collective bargaining was already beginning to take shape.

Seventh Component of Labour Law: Industrial Conciliation Act, 1934

This Act repealed the Industrial Dispute Ordinance of 1920 and became the first piece of legislation recognizing the existence of trade unions.

However, it did not apply to Africans. This was achieved through the definition of an 'employee' as 'any person engaged by an employer to perform for hire or reward work in any undertaking ... but shall not include a native'.

The Act created an officer, called the Registrar of Trade Unions, whose duties were to register trade unions and employers' organizations. Its significant contribution is that it mothered the concept of 'one industry, one union'. Section 5 of the Act provided that before the Registrar could register a trade union, he had to be satisfied that in the area in respect of which the trade union sought to cover there existed no other trade union which had been registered under the Act, and was 'sufficiently representative' of the interests concerned.

The 1934 Act also created Industrial Councils, which are the predecessors of the current National Employment Councils.

Eighth Component of Labour Law: Industrial Conciliation Act, 1945

This repealed the 1934 Act. It did not change the exclusion of natives from its scope. The purpose seems to have been to provide a more elaborate framework for the registration of trade unions and employers' organization and for the operations of industrial councils.

Ninth Component of Labour Law: Industrial Conciliation Act, 1959

This Act was passed in the face of the militancy of African trade unions that had not been recognized up to that stage. It did not include the provision excluding African workers from the ambit of labour legislation. However, it still maintained, in an unclear manner, the division between white and African workers. This was done in two ways:

- (a) trade unions registered under the 1945 Act were deemed registered under the Act. This gave advantage to white trade unions;
- (b) it allowed for the registration of trade unions based on skills. White workers claiming certain skills could register a trade union almost exclusively for themselves.

The Act also created an Industrial Court headed by a president, and made provision for Industrial Boards, which could be appointed to investigate and make recommendations in undertakings which had no trade union.

In dealing with African trade unions, it had a long section prohibiting

the use of trade union funds for political purposes.

Post-independence Developments

At independence on 18 April 1980 labour law was regulated by three main statutes: individual labour law by the Master and Servants Act (Chapter 268), collective labour law by the Industrial Conciliation Act (Chapter 267) and Public Service labour law by various Public Service Regulations. Post-independence developments adopted a piecemeal approach to labour law reform.

First Post-independence Development: Minimum Wages Act, 1980 (Act No. 4 of 1980)

This was the first piece of labour legislation in the post-independence period. It proclaimed, in its long title, that its purpose was ‘to make provision for the fixing, enforcement and collection of minimum wages, to prohibit discrimination in the payment of wages and to provide for matters incidental to or connected with the foregoing’. Its main pillar was that it empowered the Minister of Labour to promulgate minimum wages to specified classes of employees and to direct their payment.² Section 5 of the Act specified the effect of a minimum wage notice. It provided as follows:

5. Where the Minister has made a minimum wage notice –
 - (a) no employer shall contravene any provision of such minimum wage notice;
 - (b) every contract and every agreement, determination or regulation made in terms of any enactment relating to the employment of an employee to whom such minimum wage notice relates shall be construed with such modifications, qualifications, adaptations and exceptions as may be necessary to bring it into conformity with such notice;
 - (c) every agreement or arrangement of any kind whatsoever, express or implied, whether made before or after the date of commencement of such minimum wage notice, by an employer or employee to whom such notice relates, which conflicts with such notice,

² See section 3 of the Act.

shall, to the extent of such conflict, be of no force or effect.

An employer could not terminate the contract of employment solely on the ground of the requirement to pay a minimum wage.³

Second Post-independence Development: Employment Act, 1980 (Act No. 13 of 1980)

This Act repealed the Master and Servants Act (Chapter 268) and dealt with individual labour law only. The Act itself did not include many substantive provisions, but it created a framework for the Minister to regulate employment. Section 5(3) of the Act empowered the Minister to make regulations providing for:

- the rights of employees;
- the deductions which may be made from the wages of employees;
- the hours of work by employees;
- the leave, including sick leave, that shall be granted to employees;
- the provision of accommodation, food, clothing, fuel, transport and other benefits and allowances for employees;
- the establishment of pension, sick, medical, holiday, provident, insurance and other funds for employees and the levying of contributions by employers and employees thereto;
- special conditions for female and juvenile employees including the prohibition of the employment of persons below a specified age.

The formula adopted was to leave almost the entire scope of individual employment law in the hands of the Minister. It was clearly a short-term measure to buy time for a more comprehensive labour statute. However, not all matters were left to the Minister. The Act itself prohibited summary dismissal except in a narrowly defined set of circumstances such as wilful disobedience to a lawful order given by the employer, lack of skill which the employee had professed to possess, habitual or substantial neglect of duties and absence from work without the permission of the employer or without reasonable excuse.⁴

³ See section 7 of the Act.

⁴ See section 8 of the Act.

Third Post-independence Development: Resorting to the Emergency Powers Act (Chapter 83)

The new Government found reason to resort to the Emergency Powers Act [Chapter 83] to deal with labour matters. Termination of employment and the establishment of workers committees were some of the matters dealt with under this Act.

Termination of employment was regulated by the Emergency Powers (Termination of Employment) Regulations, 1982.⁵ The regulations prohibited any employer from terminating any contract of employment by notice unless both parties mutually agreed or the employer obtained written approval from the Minister. Summary dismissal in certain circumstances was permitted.⁶

Fourth Post-independence Development: Labour Relations Act, 1985 (Act No 16 of 1985)

This Act became the mainstay of post-independence labour law. Although it has been amended several times, it is still the law in place to this day. It deals with both individual and collective labour law. It repealed the Employment Act, the Minimum Wages Act and the Industrial Conciliation Act. It is not necessary to summarise the main provisions of this Act as they constitute the main pillars of our current legislation. However, it is instructive to note the following:

- the Act entrenched a two-tier labour relations system. It covered all employees except those ‘whose conditions of employment are otherwise provided for by or under the Constitution’. The latter are Government workers under the Public Service;
- it entrenched a set of rights for workers regarding trade union membership. The principle of ‘one industry, one union’ was protected;
- it protected centralized collective bargaining, with every registered trade union having an automatic right to be recognized by the employer for collective bargaining purposes;

⁵ SI 714B/1982.

⁶ See *Tavengwa v Marine Centre (Pvt) Ltd* 1984 (2) ZLR 173 (H).

- the right to strike, although granted to workers, was severely restricted;
- it provided extensive scope for Government intervention in employment matters. One such intervention was the prohibition of summary dismissal through Ministerial regulations.

Generally, the Act reflected a broadly pro-worker orientation that was condemned by the capitalistic sector.

Fifth Post-independence Development: 1st Amendment of the Labour Relations Act (Labour Relations Amendment Act, 1992)

This Act was the first amendment of the Labour Relations Act, 1985. The amendments were designed to accommodate the dictates of a new economic policy thrust of Government, styled ESAP (Economic Structural Adjustment Programme). A key feature of this policy was deregulation of the labour market. The most far-reaching amendment was to demolish the principle of 'one industry, one union'. It was argued that a trade union monopoly in any one industry militated against labour market flexibility. However, the removal was half-hearted because it did not completely take away the Registrar's discretion to refuse registration to a trade union which was not 'substantially representative' of the workers purportedly sought to be represented. The result of the amendment was that, while more than one trade union could now be registered in any industry, the Registrar still retained the discretion to refuse registration to what were considered to be frivolous trade unions.

The amendment also widened the definition of 'managerial employees' who were prohibited from trade union membership. Further, these 'managerial employees' were not allowed to belong to the same workers' committees as non-managerial employees but could establish their own. It repealed the old section 23(1) and substituted the following:

Subject to this Act and any regulations, employees employed by any one employer may appoint or elect a workers' committee to represent their interests:

Provided that no managerial employee shall be appointed or elected to a workers' committee, nor shall a workers' committee represent the interests of managerial employees, unless such workers' committee is composed solely of managerial employees appointed or elected to represent their interests.

Other aspects of the 1992 amendments were the shortening of the labour dispute settlement process and the demise of reinstatement.⁷

Sixth Post-independence Development: Public Service Act, 1995

This development did not involve any amendments to the Labour Relations Act, 1985. On the contrary, it was meant to consolidate the two-tier labour relations system existing in the country, whereby the Labour Relations Act did not apply to employees ‘whose conditions of employment are otherwise provided for by or under the Constitution’.⁸ The Public Service Act was enacted to supplement the Constitution in regulating labour relations for Public Service workers. This was being done for the first time in the history of the country. Up to this point, it had been sufficient to regulate Public Service employment through regulations only. The purpose of this Act was aptly captured in the memorandum to the Bill that gave rise to the Act:

At present the control and management of the Public Service is vested exclusively in the Public Service Commission, a body whose powers and functions are set out in Chapter VII of the Constitution. The purpose of this Bill (Act) is to redistribute those responsibilities between the Ministry responsible for the Public Service and the Public Service Commission, and to prescribe and regulate the conditions of service of public servants.

The Act subjected the Public Service Commission to a number of Ministerial controls, the most important being a requirement to consult the Minister over issues such as the creation or abolition of posts and the determination of terms and conditions of employment. For example, section 19(1) of the Act provided that:

Subject to this Act and the Constitution, the conditions of service applicable to members of the Public Service, including their remuneration, benefits, leave of absence, hours of work and discipline, shall be determined by the Commission in consultation with the Minister.

7 For a fuller discussion, see Madhuku (1998) p. 34.

8 See section 3 of the Labour Act.

Seventh Post-independence Development: Export Processing Zones Act (Chapter 14:07)

This Act was enacted at the end of 1994 as part of what was claimed to be Government's efforts to attract foreign investment. Section 56 of the Act provided that:

- (1) the Labour Relations Act [Chapter 28:01] shall not apply in relation to licensed investors operating and employees employed in an export processing zone;
- (2) the Authority may, in consultation with the Minister responsible for the administration of the Labour Relations Act [Chapter 28:01] provide rules for conditions of service, termination of service, dismissal from service and disciplinary proceedings that apply in export processing zones.

These provisions were far-reaching. They ousted the Labour Relations Act from the EPZs and left the workers at the mercy of the common law. The Act created a new category of workers who were outside the ambit of the Labour Relations Act. It was only in 1998 that the EPZ Authority enacted regulations governing employment for those workers. The regulations provided for terms and conditions of employment that were inferior to those in the Labour Relations Act.⁹

Eighth Post-independence Development: 2nd amendment of the Labour Relations Act (Labour Relations Amendment Act, 2002)

This Act brought several major amendments to the Labour Relations Act, 1985. It was the culmination of close to ten years of debate on labour law reforms, during which several drafts were written and discarded. The original intention had been to bring into force a completely new Labour Act but the Government eventually settled on effecting reforms through an Amendment Act. The first change made by this amendment was to rename the 'Labour Relations Act' as the 'Labour Act'.

The second change was very far-reaching. Except for the dispute settlement system, it harmonized labour law by bringing Public Service workers under the ambit of the Labour Act. Thus, all workers in Zimbabwe were to be under the same labour legislation. For this reason, the

9 See Export Processing Zones (Employment) Rules, 1998 (SI 372/1998).

amendment was christened by many in the field of labour relations as ‘The Harmonised Labour Act’. The third change was the introduction of the concept of ‘unfair dismissal’. Fourthly, it added generous leave conditions for employees, including granting some paid leave for trade union officials while on trade union duties, and providing for full pay for a female employee on maternity leave. The fifth change introduced a new framework for labour dispute resolution, with particular emphasis on conciliation and arbitration while imposing more restrictions on the right to strike. At the apex of the new labour dispute settlement system, it established the Labour Court, which replaced the Labour Relations Tribunal.

Ninth Post-independence Development: 3rd amendment of the Labour Act (Labour Amendment Act, 2005)

This Act made further amendments to the Labour Act. Most of the amendments were minor and appear to have been aimed at remedying some defects in the 2002 amendments. However, there were three major amendments. The first was to reinstate the old position of a two-tier labour relations system, whereby Public Service workers were not governed by the Labour Act. It repealed section 3 and substituted the following:

- (1) this Act shall apply to all employers and employees except those whose conditions of employment are otherwise provided for in the Constitution;
- (2) for the avoidance of any doubt, the conditions of employment of members of the Public Service shall be governed by the Public Service Act [Chapter 16:04].

The second amendment was the widening of the jurisdiction of the Labour Court. This was achieved by granting to the Labour Court ‘the same powers of review as are exercisable by the High Court in respect of labour matters’.¹⁰ The third amendment was the repeal of section 56 of the Export Processing Zones Act [Chapter 14:07] so that employees in EPZs were brought within the ambit of the Labour Act.

Tenth Post-independence Development: Constitution of Zimbabwe, 2013

A new Constitution came into force on 22 May 2013, replacing the 1980 (Lancaster House) Constitution. It provides for labour rights in its Bill of

¹⁰ See section 89(d1) of the Labour Act [Chapter 28:01].

Rights. Labour rights are captured in section 65, which has been reproduced in full in Chapter 1. Although it is too early to assess in detail, the provisions of the new Constitution will have a major impact on the development of labour law. Some of the implications will be discussed in the next chapters under the appropriate subjects.

CHAPTER THREE

THE CONTRACT OF EMPLOYMENT: FORMATION AND OPERATION

Introduction

The contract of employment is the basis of labour law. It can be traced to the Roman concept of the *locatio conductio*, i.e. the letting and hiring of services. There were three types of *locatio conductio*:

- *locatio conductio rei* – letting and hiring of a specified item in return for money payment;
- *locatio conductio operis* – letting and hiring of services by an independent contractor;
- *locatio conductio operarum* – letting and hiring of personal services in return for money.

It is the last category that forms the basis of the modern contract of employment. It is therefore important to determine whether or not an employment relationship (*locatio conductio operarum*) exists, as distinct from a relationship of an independent contractor (*locatio conductio operis*). The duties and rights of employers and employees only arise if an employment relationship exists.

Defining an employment relationship

It is not always easy to say whether or not an employment relationship exists. The Labour Act defines ‘employee’ as ‘any person who performs work or services for another person for remuneration or reward on such

terms and conditions as agreed upon by the parties or as provided for in this Act, and includes:

- (a) in circumstances where, even if the person performing the work or services supplies his own tools or works under flexible conditions of service, the hirer provides the substantial investment in or assumes the substantial risk of the undertaking; or
- (b) in any other circumstances that more closely resemble the relationship between an employee and employer than that between an independent contractor and a hirer of services.

This definition sheds little light on what it is that separates the contract of employment from that of an independent contractor. Reference must therefore be made to the guidance developed by the courts. Five tests have been used:

- the control test;
- the organization/integration test;
- the economic reality test;
- the mutuality of obligation test;
- the multiple or dominant impression test.

The *control test* is based on the control of the employer over the employee. The test says that an employment contract exists if the employer prescribes not only what work has to be done but also how it is to be done. An independent contractor is controlled only as to what must be done and not how it is to be done. The leading case on the control test is *Colonial Mutual Life Assurance Society Ltd v Macdonald*,¹ where it was said:

[O]ne thing appears ... beyond dispute and that is that the relation of master and servant cannot exist where there is a total absence of the right of supervising and controlling the workman under the contract; in other words, unless the master not only has the right to prescribe to the workplace what work has to be done, but also the manner in which such work has to be done.²

The main limitation of the control test is that the element of control

¹ 193/AD 412.

² At p. 434-435, See also *R v AMCA Services & Anor* 1959 (4) SA 207(A).

is not essential in a substantial number of employment contracts, particularly those where a person is employed to exercise skill or expertise according to his/her own judgment.

The *organization test* was formulated in the English case of *Stevenson, Jordan and Harrison Ltd v McDonald* [1952] 1 TLR 101:

One feature which seems to run in the instances is that under a contract of service, a man is employed as part of the business and his work is done as an integral part of the business, whereas under a contract for services, his work although done for the business, is not integrated into it but is only accessory to it.

The main problem with this test is that it is difficult to measure the extent of integration required to make a person an employee. It is for this reason that the South African Appellate Division rejected it as vague and difficult to apply in *Smit v Workmen's Compensation Commissioner*.³

The *economic reality test* has been expressed as follows by Deakin and Morris:

*The test of business or 'economic' reality essentially asks whether the worker is in business on his or her own account, as an entrepreneur, or works for another who takes the ultimate risk of loss or chance of profit.*⁴

The problem with this test is that it may suggest that a professional is always an employee as long as he/she does not have an identifiable business of his/her own. This is not the case as shown by the English case of *Hall v Lorimer*.⁵ In that case, Lorimer was a skilled television technician who worked for about 20 separate companies on short-term contracts. He was held not to be an employee of any of the companies he worked for, despite not having an identifiable business of his own. The court said:

... the question, whether the individual is in business on his own account, though often helpful, may be of little assistance in the case of one carrying on a profession or vocation. A self-employed author working from home or an actor or singer may earn his living without any of the normal trap-

3 1979(1) SA 51 (A).

4 Deakin and Morris (1995) p. 152.

5 [1994] (1) IRLR 171.

*pings of a business... the most outstanding feature ... is that Mr Lorimer customarily worked for 2 or more production companies and that the vast majority of his assignments... lasted for only for a single day.*⁶

The economic reality test is subject to the statutory modification implied by the definition of 'employee' in section 2 of the Labour Act. The definition says that a person is an employee even where he/she 'supplies his own tools' if the employer provides 'the substantial investment in or assumes the substantial risk of the undertaking'. This means that supplying one's own tools is not a sufficient consideration in determining whether or not one is in business on one's own account: whenever it arises, the question of substantial investment or assumption of risk by the other party must be considered as well.

The *mutuality of obligation test* is said to arise from the fact that, while the contract of employment is a contract to render services in return for wages, it has a second tier of obligations consisting of mutual promises of future performance. 'One possible consequence of this is that work relationships in which the second tier of obligations is lacking do not constitute contracts of employment ... In general, the mutuality test is an exclusionary one – the absence of mutuality will most likely defeat a claim of employee status, without in itself being a sufficient condition'.⁷

The *multiple or dominant impression test* applies no single factor but purports to weigh a variety of factors which indicate the existence or otherwise of a contract of employment. No single factor is decisive. For example, the control element is merely one of the factors to be taken into account. After weighing all the factors, the court determines whether or not the 'dominant impression' is that of an employee or independent contractor. This was the test applied in the case of *Southampton Assurance Company of Zimbabwe Ltd v Mutuma & Anor.*⁸ In that case, the respondent signed a contract to work as an insurance agent and his main conditions of service included (i) receiving no salary but remuneration by way of a commission, (ii) working hours left at his own discretion, (iii) no entitlement to vacation leave, sick leave or any other form of leave, and (iv) no requirement to devote the whole of

6 At p. 175.

7 Deakin and Morris, op. cit. p.154.

8 1990 (1) ZLR 12.

his working day to his duties. When the respondent approached a labour relations officer in terms of the Labour Act to challenge the termination of his contract as an insurance agent, the insurance company opposed the proceedings, arguing that the respondent was not an employee, and therefore was not covered by the Act. The High Court held that the respondent was not an employee but an independent contractor and therefore was not covered by the Labour Act.

In *Medical Association of South Africa & Ors v Minister of Health & Anor*⁹ the question was to determine whether or not part-time district surgeons were employees of the State. As part of the restructuring of district Health Services, the State terminated their contracts summarily, arguing that they were independent contractors and therefore the State was not bound by the procedures set out in the Labour Act. The Labour Court held them to be employees after considering the following factors: (i) the doctors rendered personal services; (ii) the doctors were expected to be 'at the beck and call' of the employer 24 hours a day; (iii) the employer was obliged to pay a 'contractual salary', even in the absence of any actual work being performed; and (iv) the employer exercised some control over the way in which the doctors rendered their services.¹⁰ The court made the following useful description of the 'dominant impression test':

*The dominant impression test, it seems, entails that one should have regard to all those considerations or indicia which would contribute towards an indication whether the contract is that of service or a contract of work and react to the impression one gets upon a consideration of all such indicia.*¹¹

It would appear that the trend around the world is to prefer the multiple or dominant impression test. In applying this test, the following caution must be borne in mind: 'The assessment of whether a person is an employee or self-employed does not involve a mechanical exercise of running through a check list. It is necessary to stand back and assess the whole picture which emerges from the accumulation of the details'.¹²

9 [1997] BLLR 562 (LC).

10 This summary is taken from Basson, et al. (2009) pp. 29-30.

11 At p. 569F.

12 Slade (1995) p. 92.

The role of the parties in determining whether or not a contract of employment exists

The parties may expressly say that theirs is not a contract of employment. The typical situation is where the provider of personal services signs a contract where it is expressly provided that he/she is an independent contractor and not an employee. The law appears clear: the courts will look at the reality of the situation to determine whether or not there is a contract of employment. The mere say-so of the parties does not bind the courts. To do otherwise would be to allow the parties to defeat the intentions of the Legislature in putting in place legislation meant to protect vulnerable employees. This is a matter of public policy. Authority for this position of the law is found in English law.¹³ In *Ferguson v John Dawson & Partners (Contractors) Ltd*,¹⁴ Megaw LJ said:

... a declaration by the parties, even if it were incorporated in the contract, that the workman was to be, or was to be deemed to be, self-employed, an independent contractor, ought to be wholly disregarded – not merely treated as not conclusive – if the remainder of the contractual terms, governing the realities of the relationship, showed the relationship of employer and employee.¹⁵

The reason for this approach, according to the judge, is that the courts had to give adequate recognition to the power of statutory regulation to override the common law and this necessarily meant that it could not be open to the parties themselves ‘by their own whim, by use of a verbal formula, unrelated to the reality of the relationship, to influence the decision on whom the responsibility for the safety of workmen, as imposed by statutory regulations, should rest’.¹⁶ In *Young Woods Ltd v West*¹⁷ the court ignored a clause in the contract describing a sheet metal worker as self-employed and held him to be an employee after examining the reality of the relationship. However, in a difficult case where the circumstances are evenly balanced, the parties’ description of their relation-

13 See generally Deakin and Morris, op. cit. pp. 146-48.

14 [1976] (1) WLR 1213.

15 At p. 1222.

16 Ibid.

17 [1980] (1) IRLR 201.

ship may be decisive.¹⁸ The parties' description has considerable weight where the provider of personal services is a highly qualified professional who is fully aware of the costs and benefits of describing oneself as an independent contractor.¹⁹

Essentials of contract of employment

There are three important elements of a contract of employment:

- Agreement to make personal services available
- Remuneration
- Subordination

Agreement to make personal services available

The agreement is governed by the ordinary principles of the law of contract. No specific formalities are required by law, and the contract need not be in writing. Section 12(1) of the Labour Act [Chapter 28:01] states:

Every person who is employed by or working for any other person and receiving or entitled to receive any remuneration in respect of such employment or work shall be deemed to be under a contract of employment with that other person, whether such contract is reduced to writing or not.

The requirement in section 12(2) for the employer to 'inform the employee in writing' of a set of specified particulars merely imposes an obligation on the employer to supply the information and does not require the parties to sign a written contract.²⁰ The statement of particulars is not the contract itself nor is it even conclusive evidence of the contract. The effect of the particulars required by section 12(2) appears to be aptly captured in the following remarks in *System Floors (UK) Ltd v Daniel*:²¹

[They] provide strong prima facie evidence of what were the terms of the contract between the parties but [do] not constitute a written contract between the parties. Nor are the statements of the terms finally conclusive, at most they place a heavy burden on the employer to show that the actual terms of the contract are different from those which he has set out

18 See *Calder v H.Kitson Vickers & Sons (Engineers) Ltd* (1988) ICR 232; *Massey v Crown Life Assurance Co.* [1978] ICR 590.

19 Ibid.

20 See *Rumbles v Kwa Bat Marketing (Pty) Ltd* (2003) 8 BLLR 811 LC.

21 [1982] ICR 228, [1981] IRLR 475.

in the statutory statement.

A contract of employment, like any other contract, may be vitiated by mistake or misrepresentation. A common occurrence is where the prospective employee makes a fraudulent misrepresentation, which induces the employer to enter into the contract. In such a situation, the contract of employment is voidable at the instance of the employer. The employer is entitled to rescind the contract. In other words, it is declared null and void. The facts of *Posts and Telecommunications Corporation v Winfreda Ndakaiteyi Mhaka*²² are instructive. The PTC advertised for the post of Manager, Commercial Services (Postals). It required a person with a degree in Social Sciences or any other business-related disciplines and five years experience. A postgraduate qualification in Marketing, or an MBA, was to be 'an added advantage'. Mhaka misrepresented her years of experience. One of the referees on her CV was her husband. PTC discovered the misrepresentation after she had worked for them for over six months and completed her probation period. It was established that she had made a fraudulent misrepresentation that induced the PTC to employ her. The contract was set aside. However, regarding restitution, it was conceded by the employer that there could be no claim for the recovery of salary and benefits paid to her because she had provided quality service to the PTC. The general rule that rescission entails restitution *in integrum* was not applied on the facts of this case.

There are two important aspects in which the general principles of the law of contract are ousted: anti-discrimination and the employment of children and young persons.

Anti-discrimination

The freedom of the employer to choose an employee of his/her choice is subject to the anti-discrimination provisions imposed by legislation. Section 56 of the Constitution, which is binding on every person, and binds every employer, grants every person the 'right not to be treated in an unfairly discriminatory manner'. The relevant provisions are as follows:

56(3) Every person has the right not to be treated in an unfairly discriminatory manner on such grounds as their nationality, race, colour, tribe, place of birth, ethnic or social origin, language, class, religious belief, political affilia-

²² HH 127/2003.

tion, opinion, custom, culture, sex, gender, marital status, age, pregnancy, disability or economic or social status, or whether they were born in or out of wedlock.

- (4) A person is treated in a discriminatory manner for the purpose of subsection (3) if –
- (a) they are subjected directly or indirectly to a condition, restriction or disability to which other people are not subjected; or
 - (b) other people are accorded directly or indirectly a privilege or advantage which they are not accorded.
- (5) Discrimination on any of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair, reasonable and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom.

In addition, section 5(1) of the Labour Act addresses the same issues, and provides that:

- 5(1) No employer shall discriminate against any employee or prospective employee on grounds of race, tribe, place of origin, political opinion, colour, creed, gender, pregnancy, HIV/AIDS status or, subject to the Disabled Persons Act [Chapter 17:01], any disability referred to in the definition of ‘disabled person’ in that Act, in relation to—
- (a) the advertisement of employment; or
 - (b) the recruitment for employment; or
 - (c) the creation, classification or abolition of jobs or posts; or
 - (d) the determination or allocation of wages, salaries, pensions, accommodation, leave or other such benefits; or
 - (e) the choice of persons for jobs or posts, training, advancement, apprenticeship, transfer, promotion or retrenchment; or
 - (f) the provision of facilities related to or connected with employment; or

(g) any other matter related to employment.

Although many prohibited grounds are specified, the ground with the most far-reaching impact is gender. It is therefore advisable to read the paragraphs below with gender discrimination as the main focus.²³

Discrimination on any of the prohibited grounds is unlawful. In section 5(8) the Act lists a wide range of prohibited defences, and provides as follows:

5(8) It shall be no defence to a charge in respect of a contravention of subsection (1) or (2) to prove that—

- (a) the employee or prospective employee concerned was not in fact taken into employment by the employer concerned or that such employee would, in any case, not have been taken into such employment for any other lawful reason; or
- (b) the employee or prospective employee concerned has left or has not left the employment of the employer concerned; or
- (c) the employee or prospective employee concerned has subsequently been taken into employment by the employer concerned in circumstances showing that he has not been discriminated against; or
- (d) the employer concerned subsequently withdrew or did not fill the vacancy; or
- (e) the person charged is no longer committing any contravention of subsection (1); or
- (f) the employee or prospective employee concerned was party to the alleged contravention or did not complain about it; or
- (g) it was in the business interests of the person charged to commit the contravention; or
- (h) the contract or agreement which forms the subject of the charge was entered into prior to the fixed date.

Section 5(4) provides, as a remedy, a right to any prospective employee who has been discriminated against, to seek a court order directing the employer to employ him/her even if the vacancy has already been

23 For more detailed treatment, see Madhuku (2010)..

filled. This right exists notwithstanding the fact that the employer may be required to dismiss or terminate the services of the other employee who has benefited from the discrimination.

These provisions are supplemented by the Labour (HIV and AIDS) Regulations, 2014 which prohibit any discrimination against workers, including job seekers and job applicants, on the grounds of real or perceived HIV status.²⁴

When viewed in the context of gender discrimination, the anti-discrimination scheme in the Act is unsatisfactory.

First, the test for discrimination makes it difficult for a victim to prove it successfully. The test is contained in section 5(6), which provides as follows:

For the purposes of this section, a person shall be deemed to have discriminated if his act or omission causes or is likely to cause persons of a particular race, tribe, place of origin, political opinion, colour, creed or gender to be treated –

(a) less favourably; or

(b) more favourably than persons of another race, tribe, place of origin, political opinion, colour, creed or gender, unless it is shown that such act or omission was not attributable wholly or mainly to the race, tribe, place of origin, political opinion, colour, creed or gender of the persons concerned.

The main defect of this provision is that to prove discrimination, it is essential that comparison be made with a male equivalent in order to show that there has been ‘less favourable’ treatment. This is most unsatisfactory. For instance, where an employer makes a choice between two female employees on the basis that one is of child-bearing age (and therefore unsuitable) while the other is not (and therefore suitable) a charge of gender discrimination may be difficult to sustain.

There is another problematic aspect of the above provision. It is a defence to a charge of discrimination to show that the act complained of ‘was not attributable, wholly or mainly, to the gender of the persons concerned.’ The legal impact of this is not in doubt: some element of discrimination is acceptable as long as it was not the main reason for a particular decision. This allows the following reasoning: ‘Well, I would

24 SI 105/2014 section 11.

not like to employ this woman. In any event, she is less qualified for the job than her male competitor, so she loses and the man gets it.'

It is difficult to understand why this defence was incorporated. In principle, the only defence to a charge of discrimination should be that there was no discrimination at all. In other words, that the element of gender was not one of the features, no matter how minor, which influenced the making of a particular decision. In any event, the inclusion of the defence appears unnecessary and should be jettisoned.

The second problem is the lack of specificity in relation to some of the more common manifestations of discrimination in the recruitment of employees. One common problem relates to questions posed to prospective employees relating to future plans regarding pregnancy or flexibility as regards transfers or working away from home. Such questions obviously impact negatively on women should the employer be concerned about such aspects as maternity leave or inflexibility arising from family commitments. There is much to be said for the approach where the law specifically prohibits employers from extracting certain personal details from employees that tend to disadvantage women.

Thirdly, the Act should define 'prospective employee' so as to make it clear that it goes beyond persons who are being interviewed for a job. Although the courts have not yet had occasion to consider who is a 'prospective employee', it is conceivable that the courts can limit the concept to that group of persons who have either been shortlisted for a job or have applied for it. A person who has not applied for a job because he or she has failed to meet the communicated requirements may be held not to be a 'prospective employee.' Such a result would be unsatisfactory as persons should be able to challenge the very initial step of setting up requirements for a job that are already discriminatory.

Fourthly, the Act does not shed light on the quantum of damages to be awarded for gender discrimination. What is the appropriate measure of damages? Sections 5(4) and 5(5) simply provide for 'damages for any loss caused'. The general principle of law in the calculation of delictual damages is that the plaintiff should be placed in the position she would have occupied had the delict not been committed. In this particular case, the woman would either have been employed or promoted or trained, as the case may be. Thus, in the case of non-employment due to discrimination, the position she would have occupied is that of having a job and

earning a salary and attendant benefits.

Fifthly, the remedy to seek an order of employment in section 5(4) appears subject to the discretion of the court to refuse the remedy where it may be considered inequitable to do so. This is because the wording of the section may not survive the reluctance of the courts to order specific performance in employment matters.

The sixth point arises from section 5(7)a(ii), which provides as follows:

Notwithstanding subsections (1) and (2), no person shall be deemed to have discriminated against another person:

on the grounds of sex where in accordance with this Act or any other law, or in the interests of decency or propriety, he distinguishes between employees of different sexes.

Although no specific cases have arisen from this provision, it is not clear what are the implications of the 'interests of decency or propriety'. Presumably it cannot be invoked to exclude women from jobs they would otherwise be qualified to do on a ground such as that the environment is so male dominated that the 'interests of decency or propriety' require their exclusion. However, the danger of such interpretation exists. Yet, one wonders what perceived dangers the legislators had in mind in adding such a provision. It is submitted that such a provision can simply be removed without creating any problem for the law and this seems to be the better approach.

Employment of children and young persons

The law on the employment of children and young persons is in section 11 of the Labour Act. For purposes of this law, children and young persons fall into three categories and the law relating to each is as follows:

0-13 years: No person in this category may be employed in any occupation whatsoever. The prohibition is absolute. Even an apprenticeship is not allowed. A contract of employment with any person in this category is void and unenforceable against the person. However, the person may enforce any rights that have accrued to him/her under the contract.²⁵

25 Section 11(2).

13-15 years: A person in this category may only be employed as an apprentice or where the work to be performed forms part of a course of training or technical or vocational education. The contract requires the guardian's assistance. A contract of employment outside an apprenticeship or for work that is not education-related is void and unenforceable against the person, although he/she may enforce any rights that have accrued under the contract. Further, the apprenticeship or education-related work must not be such as is likely to jeopardize his/her health, safety or morals.²⁶

15-18 years: A person in this category may be employed in any occupation as long as it is not likely to jeopardize his/her health, safety or morals.²⁷ The contract is governed by the general principles of the common law relating to capacity of minors. Thus, where the person is married or tacitly emancipated, the contract is valid without the assistance of the guardian. Work likely to jeopardize a young person's health or safety or morals, and therefore prohibited, includes underground mining, night-shift work and work involving contact with hazardous substances.²⁸

Remuneration

The payment of remuneration by the employer is a key component of the employment relationship. The obligation to pay remuneration arises when the employee has either actually done his work or, in cases where no work has been provided, the employee has placed his or her services at the disposal of the employer: see *Zimbabwe Sun Hotels v Lawn*.²⁹ If the element of remuneration is missing, there can be no employment contract.

Subordination

This distinguishes the contract of employment from other relationships where services are rendered and remuneration paid in return. The notion of subordination has a wide ambit but at its core lies some element of

26 Section 11(4).

27 Section 11(4).

28 See Schedule to the Labour Relations (Employment of Children and Young Persons) Regulations, 1997 (SI 72/1997).

29 1988 (1) ZLR 143 (SC).

control by the employer. Only a minimum of subordination need be present for there to be a contract of employment. If it is absent, there is no contract of employment.

The element of subordination comes out clearly in this oft-quoted statement:

*The relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power. In its inception it is an act of submission, in its operation it is a condition of subordination.*³⁰

Categories of employees

Employees may be placed in a variety of categories. Whether or not placing an employee in a given category has legal implications varies from category to category. Some categories have no legal significance. The following categories are worth considering:

Fixed-term employees and employees on contracts of indefinite duration

An indefinite contract is one where the parties do not specify a date of expiry. Under the Labour Act, any contract that does not specify its duration or date of termination is deemed to be an indefinite contract (described in the Act as a ‘contract without limit of time’).³¹ However, this does not apply to a contract for casual work or seasonal work or for the performance of some specific service.³² All the latter are fixed-term contracts, even where they do not specify a duration. A ‘fixed-term’ contract specifies its duration. There is no rule of law specifying a minimum or maximum period for a fixed-term contract. The minimum period is only subject to the *de minimis non curat lex* rule. The Labour Act has scope for fixed-term contracts of less than three months.³³ A fixed-term contract of less than three months, such as of one month, is not, for the reason of its duration alone, a contract for casual work.

Where an employee continues to work after the expiry of a fixed-term contract, it does not follow that he or she is then on a contract of indefinite duration. The issue is determined by principles of law governing

30 Paul Davies & Mark Friedland (1983) p. 18.

31 Section 12(3).

32 Ibid .

33 Section 12(4)(e).

implied contracts. Thus, it may be implied that the parties intend renewal of the fixed-term contract on the same terms as the expired one.³⁴ The surrounding circumstances may, however, show that the parties have entered into a contract of indefinite duration.

An employee whose fixed-term contract is continuously renewed each time it expires remains on a fixed-term contract and does not become an employee on a contract of indefinite duration.³⁵ In other words, there is no limit as to the number of times a fixed-term contract may be renewed as long as the parties are in agreement. However, the non-renewal of fixed-term contract may be regarded as an unfair dismissal in terms of section 12B(3)(b) of the Act.³⁶

The distinction between fixed-term contracts and contracts of indefinite duration has immense legal significance regarding termination. A fixed-term contract lapses automatically by operation of law at the end of its duration. In the case of a contract of indefinite duration, termination depends on whether it is under the common law or statute. Under the common law, it is terminated either by agreement or the giving of the contractually stipulated, or reasonable, notice.³⁷ In terms of the Labour Act, in general, an indefinite contract can only be validly terminated either pursuant to a retrenchment exercise or in terms of a registered Code of Conduct or under the Labour (National Employment Code of Conduct) Regulations, 2006 (SI 15/2006).³⁸ Before its expiry, a fixed-term contract can only be terminated in the same manner as a contract of indefinite duration.

The characterization of a contract as ‘fixed-term’ is not always straightforward. Two cases illustrate this.

In *Chikonye & Anor v Peterhouse*³⁹ two teachers (appellants) employed by Peterhouse were in employment contracts that contained the following clauses:

9.1 All employment contracts (unless otherwise stated) will
be subject to the employee’s satisfactory completion of a

34 *Gould v Lewis* 1913 SR 66, *Redman v Colbeck* (1917) EDL 35, *Vraund v Baker & Co.* (1905) 19 EDC 54.

35 *Kundai Magodora & Ors v Care International Zimbabwe* SC 24/2014.

36 See Chapter 5.

37 *Tiopaizi v Bulawayo Municipality* (1923) AS 317 at 325-26.

38 See *infra*.

39 1999 (2) ZLR 329(S).

first year of service. Upon fulfilment of this condition, the employee may be offered a second year of service during which period the employee's post may be declared permanent.

- 9.2 The rector/headmaster shall be the arbiter in considering whether or not an employee's professional services are satisfactory!

At the end of the second year of service, the appellants were informed that their services were no longer required. They claimed unlawful dismissal in terms of SI 371/1985. Peterhouse countered that assertion by contending that the appellants were on 'fixed-term' contracts that had been terminated by effluxion of time. The Supreme Court agreed with the High Court that the appellants were on fixed term contracts and the fact that the contracts could be renewed on satisfactory performance did not change the 'fixed-term' nature of the employment relationship because there was no obligation on the employer to offer a permanent contract. The above-cited clauses were interpreted by the Supreme Court in the following manner:

*The fact is that the contract includes three consecutive appointments: a one-year fixed term appointment, a second one-year fixed-term appointment, and during or at the end of that second period, a permanent appointment.*⁴⁰

In *Lever Brothers (Pvt) Ltd v Sheila Marafuzah & Ors* SC 23/1997, the employees had signed the following contract:

1. I (name of employee) agree to be employed by Lever Brothers (Private) Limited on a contract basis with effect from:
Date: 21.1.93 to 26.2.93.
2. I understand that my duty will be that of contract packer.
3. I agree that my wage will be \$340,34 per day for the period.
4. I agree that I may terminate this contract by giving one day's notice in advance of my leaving and conversely Lever Brothers may also give me one day's notice should they wish to terminate my service.

⁴⁰ At p. 331.

The Labour Tribunal held that the contract was one of fixed duration and could not be terminated before the expiry of the period. The Supreme Court disagreed and interpreted the contract as follows:

The contracts are to run from day to day. Either party may terminate the relationship by giving one day's notice in advance. But in the event of neither doing so, the contracts will terminate automatically at the close of business on 26 February 1993.

The contract should have been characterized as one of 'fixed-duration' and clause 4 is the normal notice clause in any contract and did entitle either of the parties to terminate the contract on notice.

Permanent and temporary employees

A permanent employee is one who is in continuous employment, usually for an indefinite period. An employee on a fixed-term contract may also be a permanent employee where the employment is continuous and the duration is sufficiently long to be considered 'permanent'. A permanent employee may be either full-time or part-time.

A temporary employee is one who is on a fixed-term contract of a duration not long enough to be reasonably considered 'permanent'. The essence of temporary employment is that it is either for a specified period of time or for a specific service or task. Temporary employees include casual and seasonal workers. The distinction between 'permanent' and 'temporary' employees has no inherent legal significance of its own, except in a few areas. In the area of private pension schemes, temporary employees are normally ineligible for membership of pension schemes. In State employment, only permanent employees are on 'pensionable conditions of service'.⁴¹

Full-time and part-time employees

Full-time employees devote all their normal working hours to one employer. Normal working times range from six to eight hours a day for five to six days a week. There is no standard definition for a part-time employee. Part-time employees are usually those who work for less than the normal working hours, such as for two or three days in a week. It may also be an issue of working for more than one employer. The distinction between full-time and part-time has no effect on the status of being an

⁴¹ See Public Service Regulations, SI 1/2000, section 6.

employee. Full-time and part-time employees may be either permanent or temporary and also be in either an indefinite or a fixed-term contract.

Casual employees

Black's Law Dictionary defines 'casual employment' as 'work that is occasional, irregular, or for a short term'.⁴² In terms of this definition, casual employment may be defined either in terms of its frequency (occasional or irregular) or of the time taken to do the work (a short time). At the core of it is the lack of its permanence. The Labour Act does not define a casual worker but defines 'casual work'. 'Casual work' is 'work for which an employee is engaged by an employer for not more than a total of six weeks in any four consecutive months'. The focus is on the volume of work, and the reference to time is merely to emphasize that casual work must be work not requiring lots of time to do it. If the work requires lots of time, it ceases to be casual work. A better formulation of the definition of casual work contemplated by the Labour Act is work of an occasional or irregular nature that is done in a short time. A casual employee is one who is engaged in such work.

Under the Labour Act, if an employer has work that requires the services of an employee for more than six weeks in four consecutive months, that work is not casual work. It cannot be said to be occasional or irregular. In such a situation, the employer must engage the employee on either an indefinite or a fixed-term contract. Section 12(3) states:

... a casual worker shall be deemed to have become an employee on a contract of employment without limit of time on the day that his period of engagement with a particular employer exceeds a total of six weeks in any four consecutive months.

This is merely a 'default provision', and places the casual worker in the same position as an employee in a contract which does not specify its duration. For the provision to apply, there must be a 'casual worker' as contemplated by the Act, namely a person employed as such who has gone beyond the stipulated six weeks. It does not apply to an employee on a contract of fixed duration, however short the duration may be. As already noted, a casual worker is one involved in occasional or irregular

42 Garner (2004).

work for a short time. Under the Labour Act, work does not become casual merely on account of the fact that it is performed by an employee on a short-term contract. Section 12(4) contemplates fixed-term contracts as varying from less than three months to over two years. In particular, section 12(4)(e) makes a distinction between a fixed-term contract of less than three months and casual work. In other words, a contract does not become one for casual work merely because it is of short duration. It is its occasional or irregular nature that makes it a casual contract.

Seasonal employees

These are employees whose work is only available in defined periods of the year such as the summer or Christmas period. The main significance of this categorization is that the contract automatically lapses at the end of the season.

Probationary employees

A probationary employee is one who is in the initial period of his or her employment where his or her skill and abilities are being assessed. The probationary employment contract is separate from the second employment contract, which is conditional on successfully completing the probation. In terms of the Labour Act, there can only be one, non-renewable probationary period.⁴³ The maximum length for a probationary period is one day for casual or seasonal contracts and three months for all other contracts.⁴⁴ This means that at the end of a probationary period, the employer has only two choices: either allow the probationary contract to lapse and let the employee go, or enter into a second employment contract with the employee. There is no room for renewal of the probationary contract.

For State employees, the probationary period ranges from six months to one year and is renewable. It is one year for the Public Service, including the secretariat of the Public Service Commission,⁴⁵ and six months for the Health Service.⁴⁶ The probationary period may be extended for a maximum period of six months

43 Section 12(5).

44 Ibid.

45 Section 7(1) of SI 1/2000; section 4(1) of SI 162/2007.

46 Section 7(1) of SI 117/2006.

(in the Public Service)⁴⁷ or one year (in the Health Service).⁴⁸

There are two main legal consequences of being on probation. The first is that the employer is entitled to subject the employee to tests and assessments, and any refusal by the employee to undergo the tests or assessments is a ground for termination of the contract.⁴⁹ The second is that a probationary contract is not a fixed-term contract in the sense of guaranteeing employment for its full duration. It can be terminated at any time by giving the requisite notice if the employee fails to meet the expectations of the employer; the concept of unfair dismissal does not arise.⁵⁰ In *Kazembe v the Adult Literacy Organisation*⁵¹ it was stated:

*A period of probation by its very nature presupposes that during the period of probation, the probationer is on trial. At the end of the period stipulated, if there is dissatisfaction by the person placing an individual on probation, common sense dictates that he is entitled to elect whether to continue to employ the probationer or not. ... What is clear is that once his probation period had ended and they were dissatisfied with his performance all they need have done is to have told him that his services were no longer needed and that would have been the end of the matter.*⁵²

Apprentices and trainees

Whether or not an apprentice or trainee is an employee depends on how the circumstances of each case are adjudged by the tests for employment already discussed. In many cases they are employees, as they render services in return for remuneration in a subordinate position. The additional aspect of undergoing training does not take away the characteristics of an employment contract.

The essence of apprenticeship is that the employer undertakes formally to train and instruct the apprentice in a particular trade or skill, the apprentice, in turn, contracts to serve the employer and to learn from those from whom he or

47 Section 7(3) of SI 1/2000.

48 Section 7(3) of SI 117/2006.

49 *SIRDC v Chakuparira* 2001 (2) ZLR 421 (S).

50 *Ibid.* See also *Madawo v Interfresh Ltd* 2000 (1) ZLR 660 (H).

51 SC 173/1994.

52 At p. 6.

*she receives instruction.*⁵³

As a general rule, an apprenticeship or training contract is an employment contract of fixed duration. However, unlike with probation, an employer cannot terminate the contract merely on giving notice where the apprentice or trainee has failed some of the examinations.⁵⁴ This is a matter of common sense: failing some tests and assessments is an inherent part of any training programme. A dissatisfied employer must wait until the end of the training period and let the contract lapse. This can be mitigated by organizing the apprenticeship or training in a series of fixed-term contracts based on satisfactory progress.

Managerial employees

This categorization has lost a lot of its earlier significance because of changes made to the Labour Act. Section 2 of the Act defines a 'managerial employee' as 'an employee who by virtue of his contract of employment or of his seniority in an organization may be required or permitted to hire, transfer, promote, suspend, lay off, dismiss, reward, discipline or adjudge the grievances of other employees'. Before 2003, the Labour Act prohibited trade unions from representing 'managerial employees', a prohibition that was removed by the Labour Relations Amendment Act, 2002 (Act No. 17 of 2002). The only remaining legal implication of being a 'managerial employee' in the Labour Act is membership of workers committees. A managerial employee cannot be appointed or elected to a workers' committee of non-managerial employees.⁵⁵ Further, a workers' committee may only represent the interests of managerial employees if it is 'composed solely of managerial employees'.⁵⁶

Except for this aspect on workers committees, and its consequences on works councils, a managerial employee, whatever the level of his or her seniority, is like any other employee in virtually all aspects of labour law.

Directors of companies

The office of a director of a company is regulated by the Companies Act [Chapter 24:3]. Some directors may also be employees of the company.

⁵³ Deakin and Morris, op. cit. p.160.

⁵⁴ See *Dunk v George Waller & Son Ltd* [1970] 2 QB 163.

⁵⁵ Section 23(1).

⁵⁶ Ibid.

A director who is the principal shareholder may also be an employee and not necessarily the employer.⁵⁷ Where a director is also an employee of the company, his or her terms and conditions of service will be regulated by both the Companies Act and the Labour Act. However, dismissal must be in terms of the Labour Act and it is not necessary to follow the procedures in the Companies Act.⁵⁸

Office-holders

An officer holder is not an employee and the relationship between the office-holder and the organization in which he or she holds office is not governed by labour law but by other aspects of public law, particularly administrative law. In *Great Western Railway v Bater*⁵⁹ an 'office' was defined as:

a subsisting, permanent, substantive position which has its existence independently from the person who fills it, which continues and is filled in succession by successive holders.

It may not be easy to determine whether a person is an office-holder or an employee. The tests already discussed have to be applied. Examples of office-holders are company directors, trustees, trade union officers, political party leaders and church leaders. It is common for a trade union to elect a general secretary and then ask him or her to work for it on a full-time basis. This is the same practice in churches and political parties. Do these persons become employees or remain office holders? The implications are fundamental. If the person becomes an employee, he or she may be dismissed by following the Labour Act, it being unnecessary to follow any procedures stipulated in the organization's constitution.⁶⁰ The better approach is to regard most of these as office-holders, in which case any suspension or removal from office has to comply with both the organization's rules and public law. Under English law, some members of the clergy have been held not to be em-

⁵⁷ *Lee v Lee's Air Farming* [1961] AC 12.

⁵⁸ *Gomwe & Anor v Associated Newspapers of Zimbabwe (Pvt) Ltd* 2001 (2) ZLR 415 (H).

⁵⁹ [1920] 3 KB 266.

⁶⁰ See *Gomwe v Associated Newspapers* (*supra*).

ployees, although also not necessarily office-holders.⁶¹

Who is the employer?

Freedom of contract means that the employer is identified by the contract: of the two parties, one is the employer and the other the employee. However, there are situations where the determination may not be straightforward. In most cases, the employer is not an individual but a legal entity such as company, association, partnership or statutory body. The general rule is that labour law respects the corporate veil and treats the employer as a separate legal entity from its owners or the persons who control it. For purposes of the Labour Act, there are instances where ‘employer’ includes the manager or other representative of the employer.⁶²

Where a group of companies is involved, each of the subsidiaries are separate legal entities from the holding company. An employee of a subsidiary company is not also an employee of the holding company.⁶³

A public body wholly funded by the State remains a separate legal persona and is the employer of its employees. In *Midlands State University Council v Midlands State University Lecturers Association*,⁶⁴ the university sought to resist an arbitral award on the basis that the approval of the Minister was required before an increase in salaries. This was rejected by both the Labour Court and the Supreme Court. It was held that although the Government was the *de facto* paymaster, the university was the *de jure* paymaster and it alone was the employer. It was a separate legal persona created by statute.

In cases where a labour broker supplies workers to a ‘client’ there are three parties: the labour broker, the employee and the ‘client’ where work is done. The client may exercise a great deal of control over the activities of the employees. Whether the employer is the broker or the client will depend on an examination of all the circumstances.

A business may be sold and transferred to another. What happens to the contract of employment? Under the common law, the personal nature of the employment contract means that neither party may cede its rights

61 *Rogers v Booth* [1937] 2 ALL ER 751 (where officers in the Salvation Army were held to be office-holders); *President of the Methodist Conference v Parfitt* [1984] QB368; *Davies v Presbyterian Church of Wales* [1986] IRLR 194. [1986] ICR 180.

62 See definition of employer in section 2 of the Labour Act.

63 *Zimnat Life Assurance Limited v George Dikinya* SC 30/2010.

64 2005 (2) ZLR 213 (S).

under the contract without the consent of the other party.⁶⁵ Accordingly, an employer cannot, when transferring or selling its business to another, transfer the contracts of employment as well. The transfer of the business amounts to wrongful dismissal under the common law.⁶⁶ This position of the common law is modified by section 16 of the Labour Act. This provision transfers the contract of employment to the transferee on the same terms and conditions and deems the employees to be in continuous employment. The purchaser of the business is the new employer with the same rights and obligations as the old employer. By legislative fiat, the employee is not given the right to object to employment by the new employer, a situation that effectively amounts to compelling an employee to work for an employer he or she has not chosen. Condemning such a state of affairs, the European Court of Justice has said such compulsion 'would undermine the fundamental rights of the employee who must be free to choose his employer and cannot be obliged to work for an employer that he has not freely chosen'.⁶⁷ This is a neo-liberal perspective which is insensitive to the protection offered by section 16 to vulnerable workers who never 'chose' an employer.

The full implications of section 16 were considered in *Mutare Rural District Council v Chikwena*.⁶⁸ Chikwena was employed by the Mutare Rural District Council at one of its factories known as Mutare Furniture and Hardware. While he was on study leave, the Council formed a company that acquired all the assets of the factory and his salary was paid by the new company for a period of two years. The latter then developed financial problems and ceased operating. Chikwena sought an order declaring that he was still employed by the Mutare Rural District Council. He won in the High Court but the Council appealed to the Supreme Court which held that Chikwena was no longer an employee of the Council by operation of section 16 of the Act. The transfer of the factory to a new company was a transfer of an 'undertaking' within the contemplation of section 16. Accordingly, the new company became the employer of all employees of the Council who worked in the factory, including Chik-

65 *Isaacson v Walsh & Walsh* (1903) 20 SC 569.

66 *Ntuli & Others v Hazelmores Group* (1989) 9 ILJ 709 at 713A; *BTR Dunlop v National Union of Metal Workers of SA* (1990) 11 ILJ 143; *Nokes v Doncaster Amalgamated Collieries Ltd* [1940] AC 1015, *Brace v Calder* [1895] 2 QB 253.

67 *Katsikas v Konstantinidis* [1993] IRLR 179.

68 2000 (1) ZLR 534 (S).

wena who was on study leave. His bonding agreement with the Council fell away by operation of law the moment the business was transferred. Gubbay CJ said:

...section 16(1) provides a statutory exception to the fundamental common law principle that a person is entitled to choose the employer whom he promises to serve so that the right to his services cannot be transferred from one employer to another without his consent. Thus, at the date of transfer of the undertaking all those persons who were employed in the furniture and hardware factory became employees of CIG (the new company). The fact that the respondent happened to be on study leave and not physically working in the factory, did not make him any the less an employee of the appellant's undertaking. His position was no different from that of the other employees.⁶⁹

It was held further that the word 'undertaking' in section 16(1) connoted a business or enterprise and thus covered a separate business such as the furniture and hardware factory.

An employee may, under section 16(2), accept less favourable terms and conditions of employment and that is perfectly legal.⁷⁰

Sources of terms and conditions of employment

Like any other contract, the contract of employment has its own terms and conditions. It is these terms and conditions which define the rights and obligations of the parties. The question is: where are those terms and conditions found? Labour law recognizes the following sources: express terms, terms implied by the common law, terms implied from the facts, terms incorporated by legislation and terms incorporated by custom.

Express terms

Express terms are those which the parties have expressly provided for either orally or in writing. There are two issues with express terms. The first is to prove that a purported term is indeed an express term of the contract of employment. With written terms, proof is rarely difficult: the terms may be found in the individual contract document or may be incorporated by reference to the provisions of a collective bargain-

⁶⁹ At p. 538F.

⁷⁰ *Dhege v Bell Medical Centre* 2004 (1) ZLR 352 (H).

ing agreement. Where there is a signed contract document, the *caveat subscriptor* rule applies and the parties are bound by the terms in their written document. Section 12(2) of the Act requires an employer, 'upon engagement of an employee', to inform the employee of a number of particulars. While the particulars are not conclusive evidence of the express terms of the contract of employment, they are *prima facie* evidence.

The particulars supplied cannot be relied on by the employer to derogate from the contractual terms contemplated by both parties. Further, the particulars can only state the terms which exist, in the sense that they have been agreed to by the parties. The particulars are not an offer of new terms and conditions of employment.

Difficulties of proof arise with oral terms. The general rule is that those who allege must prove. If proven, an oral express term has the same status as a written express term.

The second issue with express terms is their meaning. This is a matter of interpretation. The general principles applicable to the interpretation of contracts apply.

Terms implied by the common law

At the core of the terms implied by the common law are the rights and obligations of the parties. These apply in the absence of express terms to the contrary. Some terms implied by the common law cannot be ousted by express terms. For example, the parties cannot contract out of the vicarious liability of the employer because this is a matter of public policy.

Terms implied from the facts

Terms implied from the facts are matters which the parties have not expressly provided for but which they have agreed to. The most celebrated approach to terms implied from the facts is the 'officious bystander test' enunciated in the following terms in *Shirlaw v Southern Foundries (1926) Ltd.*⁷¹

Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common 'Oh, of course'.

71 [1939] 2 KB 206.

Terms incorporated by legislation

The terms imposed by legislation have an automatic and compulsory effect. They override any terms to the contrary agreed by the parties. The effect of legislation is to provide a 'floor of rights', that is, to set minimum standards which cannot be derogated from. The contract of employment cannot provide the employee with rights or benefits which are inferior to those provided in legislation. The contract of employment can only provide more advantageous terms and conditions of employment. In terms of the Labour Act, provisions of a collective bargaining agreement also provide a 'floor of rights' and, where the provisions are better than what is contained in the Labour Act, the contract of employment automatically incorporates the better terms in the collective bargaining agreement.

Terms incorporated by custom

English cases have ruled that custom can be incorporated into a contract of employment if it is reasonable, certain and notorious.⁷² This appears to be the position in Zimbabwe as the requirement of 'notorious' covers the two aspects of 'long-binding and uniformly observed'. The best illustration of the incorporation of a term from custom is the English case of *Sagar v H Ridehalgh & Son Ltd*.⁷³ The following summary of the facts and the decision given by Deakin and Morris is apt:

The employer claimed the benefit of a custom of 'making deductions for careless work (which) had been in existence for many years,' in its mill. It was also argued that a majority of mills in the district observed a similar practice. The employee 'stated that at the time of his engagement he knew nothing of the system of fines or deductions, and that until much later he did not become aware that there was a system in vogue at the defendant's mill'. ... Farwell J held against incorporation on the grounds that the usage was not sufficiently general (15% of the Lancashire mills did not observe it) and that the 'practice was not reasonable or certain, because it was precarious, depending on the will of the master'. His judgment was reversed by the Court of Appeal. Lawrence LJ, citing

72 *Devonald & Sons Ltd v Rosser* [1906] 2 KB 728 at 743, *Sagar v H Ridehalgh & Son Ltd* (1930) 2 Ch 117 at 133.

73 *Ibid*.

the employer's evidence that the practice had been in operation at the mill for over 30 years, held that 'it is clear that the plaintiff accepted employment in the defendants' mill on the same terms as the other weavers employed at that mill ... it is immaterial whether he knew of it or not, as I am satisfied that he accepted his employment on the same terms as to deductions for bad work as the other weavers at the mill'. Nor was the usage either insufficiently general within the trade or unreasonable in the circumstances: 'the deductions are not arbitrary deductions at the will and pleasure of the employer; they are limited to cases where there has been bad work, and they are limited to an amount which does not exceed the actual or estimated damage or loss occasioned to the employer by the act or omission of the workman'.⁷⁴

⁷⁴ Deakin and Morris, op. cit. p. 240.

CHAPTER FOUR

CONTRACT OF EMPLOYMENT: RIGHTS AND OBLIGATIONS OF THE PARTIES

Duties of the Employee

To make service available to the employer

The employee is obliged to make his or her service available to the employer.¹ This duty is so important that entitlement to remuneration is dependent on the employee making available his or her services. It must be emphasized that the duty does not entail that the employee actually renders service, but merely that he or she is available to render services.² In any event, the employer is not obliged to provide the employee with work except in special cases.³ The employee's duty to make services available is a continuing obligation, which exists until the termination of the contract or some authorized absence.⁴ The general rule under the common law is that absence from work constitutes a breach of contract in that the employee has failed to make service available. Even unpunctuality is a breach because there is no service rendered when the employee is late for work. The issue is always one of determining whether the absence or unpunctuality is a serious or fundamental breach of the contract. Absence due to participation in a strike is regarded as a

1 *Smit v Workmen's Compensation Commissioner* 1979 (1) SA 51 (A) at 61C; *Prins v Universiteit van Pretoria* 1980 (2) SA 171 (T) at 174 F-G.

2 *Johannesburg Municipality v O'Sullivan* 1923 AD 201.

3 *Muzondo v University of Zimbabwe* 1981 ZLR 333.

4 *Negro v Continental Spinning & Knitting Mills* 1954 (2) SA 203 (W).

serious breach whether or not the strike is lawful.⁵ Absence due to illness is not regarded as a breach of this duty except where the illness is protracted and the absence has become unreasonably long.⁶

Under the common law, breach of this duty warrants summary dismissal. The common law has been modified by statute. In terms of SI 15/2006, breach of this duty only constitutes serious misconduct warranting disciplinary action with a view to dismissal in two circumstances, namely (i) absence from work for a period of five or more working days in a year without leave or reasonable cause,⁷ and (ii) habitual or substantial neglect of his or her duties.⁸ Any breach less than these will not warrant an action for dismissal. Most codes of conduct follow the same approach.

An employee who does not render services or prematurely terminates the contract of employment may be sued for breach of contract and be made to pay damages to the employer.⁹

Hours of work

The employee's obligation to make service available exists during working hours. Under the common law, it is up to the parties to regulate the employee's working hours. However, hours are usually fixed in the contract or collective agreement. The Labour Act does not stipulate maximum hours of work which is left to collective agreements and individual contracts of employment. An employee may refuse to work overtime but it has been held that an employer may dismiss an employee who unreasonably refuses to work overtime.¹⁰

Type of work

Apart from the work expressly provided for in the contract of employment, it is an implied term of a contract of employment that an employee may be asked to perform additional tasks which are closely related to

5 *R v Smit* 1955 (1) SA 239 (C); *Ngewu & Others v Union-Cooperative Bank & Sugar Co. Ltd* 1982 (4) SA 390 (N); *Coin Security (Cape) v Vikani Guards & Allied Workers Union* 1989 (4) SA 234 (C).

6 *Beretta v Rhodesia Railways Ltd* 1947 SR 48 at 51, 1947 (2) SA 1075 at 1080; *Magawo v Caledon Divisional Council* 1972 (3) SA 365 (C), *Myers v Sieradzki* 1910 TPD 869.

7 Section 4(e) of SI 15, 2006.

8 Section 4(g) SI 15, 2006.

9 *United Air Charters (Pvt) Ltd v Jarman* 1994 (2) ZLR 341 (S).

10 *Steel Engineering & Allied Workers Union v Trident Steel* (1986) 7 ILJ 86.

the employee's duties.¹¹

To be competent

The employee impliedly undertakes to be reasonably competent or to exercise normal skill and diligence in the performance of his or her work.¹² The employer may, at common law, summarily dismiss the employee for incompetence. In general, an employee is not obliged to disclose past misconduct except in circumstances where a duty to disclose can be implied, such as where the past misconduct affects the fitness of an employee to discharge his or her functions.¹³

SI 15/2006 has modified the above position to the extent that mere incompetence is not sufficient to trigger disciplinary action with a view to dismissal. There has to be 'gross incompetence or inefficiency in the performance of his or her work'.¹⁴ Further, 'lack of skill which the employee expressly or impliedly held himself to possess' is made a separate ground for disciplinary action with a view to dismissal.¹⁵ In *Quest Motor Corporation (Pvt) Ltd v Nyamakura*¹⁶ the employer sued the employee for damages arising from what the employer alleged to be the employee's negligence in the performance of his duties. The employee had not held himself out as possessing any special skills or attributes. The court held that the employee's failure was due to incompetence rather than negligence. The employee was therefore not liable as he had not held himself out to be possessing any special skills.

Good faith

The employee is obliged to serve the employer honestly and faithfully.¹⁷ This obligation is manifested in various ways, the most important of which are: (i) the employee is in general prohibited from working for a rival employer even during his or her spare time if that will seriously

11 *Maranatha Ferrochrome v Oswell Nyemba* SC 28/2012 at p. 4.

12 *Quest Motor Corporation (Pvt) Ltd v Nymakura* 2000 (2) ZLR 84 (H). *Wallace v Rand Daily Mails Ltd* 1917 AD 479 at 482; *Friedlander v Hodes* 1944 CPD 169; *Lister v Romford Ice & Cold Storage Co. Ltd* [1957] AC 555; *Harmer v Cornelius* (1843-60) All ER Rep 624, *Ndamase v Fyfe-King* NO 1939 EDL 259.

13 *Hoffman v Mani's Wineries Ltd* 1948 (2) SA 163 (C).

14 Section 4(f) of SI15/2006.

15 Section 4(h) of SI 15/2006

16 2000 (2) ZLR 84(H).

17 *Rashayi v Bakasa African Council* 1978 RLR 389 (A); *Premier Medical & Industrial Equipment (Pvt) Ltd v Winkler* 1971 (3) SA 866 (W) at 867.

damage the principal employer's business.¹⁸ Apart from this, however, in the absence of an agreement to the contrary, an employee is entitled to hold two compatible jobs as long as the second is done outside the working hours for the first;¹⁹ (ii) the employee may not use his or her employment to make secret profits and it has been said that the employee has an obligation to account for all money and property received in the course of employment;²⁰ (iii) the employee should not disclose confidential information obtained in the course of employment.²¹ In England, the duty of confidentiality has been treated as separate from the duty of fidelity.²²

In general, the duty of good faith is a fiduciary duty, which requires the employee to pursue the best interests of the employer. Breach of the duty to act in good faith entitles the employer, under the common law, to summarily dismiss the employee.²³ Under SI 15/2006 the duty of good faith is reflected in paragraphs (a) and (d) of section 4. In *Zimbabwe Mining & Smelting Co. v Zakeyo*,²⁴ the employee was a General Manager. The employer entered into a contract with a transport company in terms of which the latter agreed to supply heavy-duty trucks to move the employer's materials at fixed rates per hour for each vehicle. The employee secretly entered into a sub-contract with the transport company, in terms of which his own private vehicle was hired for use in the discharge of the transport company's obligations to his employer. The employee did not disclose this personal interest to his employer. It was held that by placing himself in such a conflict of interests situation, the employee had

18 *Hivac Ltd v Park Royal Scientific Instruments Ltd* [1946] CL 169; *Ketteringham v Cape Town City Council* 1933 CPD 316; *Harrismith Building Society v Taylor* 1938 OPD 36.

19 *Gerry Bouwer Motors (Pvt) Ltd v Preller* 1940 TPD 130; *Mine Workers Union v Broderick* 1948 (4) SA 959 (A).

20 *Gerry Bouwer Motors (Pvt) Ltd v Preller* 1940 TPD 130 – accepting gifts without disclosure amounts to unfaithfulness and dishonesty even without any prejudice to employer; *Uni-Erections v Continental Engineering Co. Ltd* 1981 (1) SA 240 (W) at 252H; *Sinclair v Neighbour* [1967] 2 QB 279. The employer may reclaim secret profits: *O'Shea v Chiunda* 1999 (1) ZLR 333 (S).

21 *Coolair Ventilator Co. (SA) v Liebenberg* [1967] (1) SA 686 (W); *Harvey Tiling Co. v Rodomac (Pvt) Ltd.* 1977 (1) SA 316 (T).

22 *Faccenda Chicken Ltd v Fowler* [1986] IRLR 69.

23 *Jones v East Rand Extension Gold Mining Co.* 1963 TH 325; *Gerry Bouwer Motors v Preller Pvt Ltd* 1940 TPD 130.

24 2007(1) ZLR 132 (S).

breached his duty of good faith. The breach was an act of misconduct. Malaba JA had this to say:

*... the general rule, the breach of which founded the ground of misconduct with which the respondent was charged, is that any person who is in a relationship where he has a duty to act in the best interests of the other party is not allowed to put himself in a position where personal interests conflict, or might conflict, with the interests of one whom he is bound to protect... The duty to disclose does not depend upon proof of the existence of actual conflict of duty and self-interest only. It is sufficient for the purposes of enforcement of the rule that there be a potential conflict of duty and self-interest arising from the engagement entered into or about to be entered into by the employee.*²⁵

The duty of good faith terminates with the termination of the employment contract and can only subsist thereafter if there is a clause in restraint of trade.

Restraint of Trade

A contract in restraint of trade is one that restricts a party's freedom to carry on his or her trade, profession or business. An employer may restrain an employee in the contract of employment so that after leaving employment, the employee may not compete with the former employer either independently (say, by setting up business) or by entering an employment contract with a rival.²⁶

Under English law, such contracts were at one time invariably void.²⁷ The rationale for this position was English law's preoccupation with promoting free trade. Since 1894, English law has been as follows: A contract in restraint of trade is not invariably void. It is *prima facie* void but it becomes valid if it is reasonable between the parties and is not against the public interest.²⁸ The requirements of reasonableness and the

25 At p. 139H-140A.

26 For a definition of a contract in restraint of trade, see *Rhodesia Milling Co. (Pvt) Ltd v Super Bakery (Pvt) Ltd* 1973 (2) RLR 145; 1973 (4) SA 436; *Esso Petroleum Co. Ltd v Harper's Garage* [1967] 1 All ER 699.

27 *Claygate v Batchelor* (1602) Owen 143; see Treitel (1995) p. 412.

28 See *Nordenfellt v Maxim Nordenfellt Guns & Ammunition* [1894] AC 535; *Mason v Provident Clothing & Supply Co. Ltd* [1913] AC 724].

public interest are separate but tend, in practice, to be fused. A restraint is reasonable if it goes no further than is reasonably necessary for the protection of the restrainer's interests. Even where it is reasonable, it may still be invalid if it is against the public interest.²⁹ As regards restraint of trade clauses in employment, it is trite under English law that the interest meriting protection between the employer and employee is narrower than that between a buyer and a seller of a business.³⁰ Accordingly, an employer cannot restrain an employee from competing with it by restraining the use of the employee's own skill even though that skill was learnt from the employer. Such a restraint is per se unreasonable.³¹ The employer's interests are covered in restraining the employee from (a) using or disclosing trade secrets, (b) using or disclosing other confidential information, and (c) soliciting the employer's customers. The onus is on the employer to establish the reasonableness of the restraint, while the employee, in resisting enforcement, has to establish that it is contrary to the public interest. Reasonableness is determined by reference to the circumstances existing at the time the contract was made.³²

The above expression of English law is important because it is the law that was applying in Zimbabwe and South Africa up to 1984.³³ In 1984, the case of *Magna Alloys & Research v Ellis*³⁴ abandoned English law and held that restraint of trade clauses should be treated like any other contractual terms and should, in principle, be enforceable. The court thus preferred the value of freedom of contract to that of freedom of trade. It must be noted that:

*Two values or freedoms come into conflict when the legality of a restraint of trade is an issue, namely freedom of contract and freedom of trade. These values are basic to modern society, as far as both individual interests and public interests are concerned. The one cannot be given preference to the exclusion of the other.*³⁵

29 See Treitel, op.cit. p. 421.

30 Ibid, p. 415.

31 *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688, *Faccenda v Chicken Ltd v Foul-er* 1987 CL 117.

32 See Treitel, op. cit. p. 413 and the authorities therein cited.

33 See generally Christie (1996) pp. 400-02.

34 1984 (4) SA 874 (A).

35 Van der Merwe, et al. (1993), p. 156.

The choice of freedom of contract had earlier been expressed by Diddcott J in the following words:

*I am satisfied that South African law prefers the sanctity of contracts. ... Freedom of trade does not vibrate nearly as strongly through our jurisprudence ... it is intrinsically the less commending of the two ideas.*³⁶

The law stated in the *Magna Alloys* case (*supra*) is that contracts in restraint of trade are prima facie valid. Enforcement may only be refused if the person bound by it is able to show that such restraint is against the public interest. The reasonableness of the restraint is a relevant consideration but it is not, by itself, a measure of the public interest. In *Book v Davidson*,³⁷ the Zimbabwean Supreme Court approved and applied *Magna Alloys*, thus abandoning English law.

The question of reasonableness for purposes of the public interest is determined as at the time of the enforcement of the clause.³⁸ Reasonableness of a restraint of trade is a question of law.³⁹ The main effect of the *Magna Alloys* case is the shifting of the onus of proof. In *Mangwana v Mparadzi*,⁴⁰ the court said:

*The primary effect of Magna Alloys, as accepted into our law by Book v Davidson, was to determine that the principle that contracts are to be obeyed takes precedence over the principle of freedom of trade. Hence the shifting of the onus from (in this case) the employer to the employee.*⁴¹

Where the employee shows the restraint to be too wide, the courts are entitled to enforce it partially.⁴² The part to be enforced need not necessarily be standing alone to be severable from others (the so-called ‘blue pencil test’) but it is sufficient if the court is satisfied, after considering

36 *Roffey v Catterall*, Edwards & Goudre 1977 (4) SA 494 (N) at 505.

37 1989 (1) SA 638 (ZS).

38 *Magna Alloys* and *Book v Davidson* (*supra*), which in this regard overruled the earlier decision in *Commercial and Industrial Holdings (Pvt) Ltd v Leigh Smith* 1982 (4) SA 226 (ZS); 1982 (1) ZLR 247(S), which was based on English law.

39 *Greendale Hardware & Electrical (Pvt) Ltd v Bangaba* 2007 (2) ZLR 17 (S).

40 1989 (1) ZLR 79 (SC).

41 per McNally JA at 83F.

42 The *Magwana* case, (*supra*).

public policy, that a part is enforceable.⁴³ Thus in the *Mangwana* case (*supra*), the court reduced the period of the restraint from five years to three, an order that would not have been possible under the blue pencil test which only required the court to strike out words and not write words in.

The issue of the public interest depends on a variety of factors: the nature of the restraint, the areas covered by the restraint, the duration of the restraint and the bargaining strength of the parties. It is against the public interest for the employer to use a restraint of trade clause as a protection against mere competition from a former employee by preventing the former employee from carrying on business similar to that undertaken by the employer.⁴⁴ This is because an employee cannot be prevented from exercising the knowledge and skill acquired during employment.⁴⁵ Accordingly, any restraint whose sole purpose is to prevent an employee exercising knowledge and skill acquired during employment is unreasonable and thus contrary to the public interest.⁴⁶ What is perfectly acceptable for the employer to protect via a restraint of trade clause are proprietary rights such as trade secrets and trade connections, provided the restraint is no more than is reasonably necessary to protect such interests.⁴⁷

To be obedient

The employee owes an implied duty to obey lawful orders of the employer.⁴⁸ Under English law, it is clear that the employer's order should not only be lawful but also reasonable.⁴⁹ Although this formulation has not been articulated in the superior courts in South Africa and Zimbabwe, it is submitted that an unreasonable order may be against public policy and therefore unlawful if, for example, it exposes the employee to personal harm or the order is degrading and insulting.⁵⁰ The English law formu-

43 Ibid. The blue pencil test had been criticized in *Roffey v Caterall* (*supra*); *National Chemsearch (SA) (Pvt) Ltd v Borrowman* 1979 (3) SA 1092 and was jettisoned in *Magna Alloys* (*supra*).

44 *Greendale Hardware & Electrical (Pvt) Ltd v Bangaba* 2007 (2) ZLR 17(S).

45 Ibid.

46 Ibid.

47 Ibid.

48 *Moonian v Balmoral Hotel* 1925 NPD 215; *Smit v WCC* 1979 (1) SA 51 (A).

49 *Laws v London Chronicle (Indicator Newspapers) Ltd.* [1959] 1 WLR 698 at 700.

50 Rycroft & Jordan, *op.cit.* p. 64.

lation should therefore be regarded as a more accurate statement of the law. An order is unlawful if it requires the employee to perform an illegal act or to do something that falls outside the scope of his or her duties.

To entitle the employer, under the common law, to summarily dismiss on the basis of disobedience or refusal to obey the act should be deliberate and of a serious nature.⁵¹

Alongside the duty of obedience is the employee's duty of respect, which requires the employee to 'behave in a manner compatible with the subordinate position in which the employee by definition stands vis-à-vis the employer'.⁵² Persistent insolence may justify summary dismissal.⁵³ SI 15/2006 has modified the duty of obedience for purposes of disciplinary action contemplating dismissal by requiring it to be 'wilful disobedience to a lawful order'.⁵⁴

Transfer of an employee

The duty of obedience means that the employer has the right to transfer an employee from one station to another provided the employer's business is carried on at different places.⁵⁵ The power of the employer in this regard is not unlimited. First, it may be curtailed by the contract of employment. If this stipulates a specific place of work, the employer cannot transfer the employee without being in breach of contract. Secondly, the employee may, on good cause, successfully challenge the employers order to transfer.⁵⁶ Thirdly, in the light of section 65(1) of the Constitution which grants a right to fair labour practices, the employee has a right to be heard (*audi alteram partem* principle) before the decision to transfer is made. Where the employer is a public body, such as a local authority, the right to be heard before transfer need not be based on a constitutional right but also exists by virtue of the common law rules

51 See cases cited above and *Burnett v Standard Tobacco Co. Ltd* 1957 R & N 508.

52 Grogan, p. 47. See also *Jamieson v Elsworth* 1915 AD 115 where, in referring to an offensive letter written by an employee to an employer, Innes CJ said, 'A communication of that nature was not only highly improper but it rendered a continuance of the existing relationship between the parties wholly impossible. No self-respecting man could continue to employ a manager who so addressed him.' (at p. 120).

53 *Zieve v National Meat Supplies* 1937 AD 177.

54 Section 31(1) (b).

55 *Guruwa v Traffic Safety Council of Zimbabwe* 2009 (1) ZLR 58(S).

56 *Ibid.*

in administrative law.⁵⁷ For State employees, the right to be heard before a transfer is well established.⁵⁸

Duty of co-operation

Under English law, it is said that there is an implied duty of co-operation between employer and employee. It requires the employee 'to use his or her efforts to ensure the efficient running of the enterprise'.⁵⁹ It also involves an obligation on the employer not to make the task of the employee more difficult. Thus, it has been held a breach of this duty for an employer to criticize a manager in front of subordinates⁶⁰ or to make groundless accusations of theft.⁶¹ This duty has been used to render a work-to-rule a breach of contract.⁶²

Obligations of the employer

To receive the employee into service

The employer is obliged to receive the employee into service.⁶³ This does not, however, oblige the employer to provide work for the employee, as there is no such general obligation on the employer under our law.⁶⁴ An obligation exists where the employee's remuneration depends on the performance of work, such as remuneration based on commission, or where the provision of work is necessary to maintain the employee's skills or reputation.⁶⁵ There is also an obligation to provide work in cases where failure to do so leads to degrading the status of the employee.⁶⁶

Payment of remuneration

The payment of remuneration is the employer's principal obligation. The

57 *Director of Works & Anor v Nyasulu & Ors* 2002 (1) ZLR 658(S).

58 *Taylor v Minister of Higher Education & Anor* 1996 (2) ZLR 774 (S)

59 Deakin & Morris, op.cit. p. 296.

60 *Associated Tyre Specialists (Eastern) Ltd v Waterhouse* [1976] (1) IRLR 386.

61 *Robinson v Crompton Parkinson* [1978] (1) IRLR 61.

62 *Secretary of State for Employment v ASLEF* (2) [1972] ICR 19.

63 *Kinemas Ltd v Berman* 1932 AD 246.

64 *Faberlan v McKay & Fraser* 1920 WLD 23; *Consolidated Frame Calton Co-operation Ltd v President of the Industrial Court* 1986 (3) SA 786 (A) at 798 and *Smit v Workmens' Compensation Commissioner* 1979 (1) SA 51 (A) at 61.

65 *Collier v Sunday Referee Publishing Company Ltd* [1940] 4 All ER 234 at 236; *Muzondo v University of Zimbabwe* 1981 ZLR 333.

66 *Stewart Wrightson (Pvt) Ltd v Thorpe* 1974 (4) SA 67 (D) approved on appeal 1977 (2) SA 943 (A) at 951.

obligation only arises when the employee has either actually done the work or – in cases where no work has been provided – has placed his or her services at the disposal of the employer.⁶⁷ The common law principle is ‘no work, no pay’ and the reason for non-availability for service is irrelevant; it may be illness or a strike or deliberate refusal to render services.⁶⁸ The duty to pay remuneration is not suspended even where the employer suspends an employee pending investigations into suspected misconduct.⁶⁹

The regularity of payment will depend on the agreement of the parties, but this is subject to any applicable collective bargaining agreement. The Labour Act merely requires wages to be paid ‘at regular intervals on working days at or near the work place’.⁷⁰ A failure or refusal by the employer to pay entitles the employee to refuse to render services without being held to be in breach of contract, because the latter obligation is reciprocal to that of payment of remuneration.⁷¹ Further, the refusal by the employer to pay entitles the employee to treat it as a repudiation and to cancel the contract and sue for damages.⁷² Under the common law, remuneration may be money or money’s worth.⁷³ Many collective bargaining agreements prohibit payment in kind.

The Labour Act does not totally prohibit payment of remuneration in kind but severely restricts its scope. Firstly, remuneration in kind is only allowed in industries or occupations where such payment is customary.⁷⁴ Secondly, even where it is customary for payment of remuneration to be in kind, it is mandatory that some portion be in money.⁷⁵ Thirdly, the value of the payment in kind must be fair and reasonable.⁷⁶ Fourthly, the payment in kind must be appropriate for the personal use and benefit of

67 *Boyd v Stuttaford & Co.* 1910 AD 101; *Johannesburg Municipality v O’Sullivan* 1923 AD 201.

68 *Ibid.* See also *Voet* 19.2.27; *East London Municipality v Thomson* 1944 AD 56.

69 *Gladstone v Thornton’s Garage* 1929 TPD 116; *Zimbabwe Sun Hotels (Pvt) Ltd v Lawn* 1988 (1) ZLR 143 (SC).

70 Section 12A(3).

71 *Coin Security v Vukani Guards* 1989 (4) SA 234 (C) at 239.

72 *O’Connell v Fischman* 1948 (4) SA 191 (T).

73 *Jamieson v Elsworth* 1915 AD 115, *Martin v De Kock* 1948 (2) SA 719 (A).

74 Section 12A(2)..

75 Section 12A(2)(e).

76 Section 12A(2)(b).

the employee and his or her family.⁷⁷ Finally, no payment may be made in the form of liquor or drugs.⁷⁸

The amount of remuneration must be fixed by agreement, failing which the common law implies reasonable remuneration.⁷⁹ This is subject to either statute or a collective bargaining agreement. Where there is a collective bargaining agreement binding on the parties, the amount of remuneration payable must not be less than that stipulated in the agreement.⁸⁰ Industries not governed by a collective bargaining agreement are subject to the minimum wage notices issued in terms of the Labour Act.⁸¹

Some problems arise with strikes. Under the common law, a strike is a serious breach of contract, entitling the employer to summarily dismiss, and strikers are not entitled to be paid during the period they are on strike. However, is the employer still obliged to make payments of other benefits in kind such as transport allowances or contributions to a pension fund or medical aid scheme during the period of the strike? There is no case law in point but it is submitted that the suggestion made by Rycroft & Jordan that in such cases, what is only suspended is the payment of wages while other obligations continue, is supportable in principle and should be regarded as the common law position.⁸²

The Labour Act requires the employer to continue with remuneration in kind by way of accommodation and the provision of food and other basic amenities of life but it may recover the monetary value of such remuneration by instituting an action in the Labour Court.⁸³

Under the common law, an employer is not entitled to make unilateral deductions from an employee's wages for illiquid claims, such as for damages to the employer's property.⁸⁴ The Labour Act prohibits deductions or set-off except in the instances listed in section 12A(6).

Any term of an employment contract purporting to allow the employer

77 Section 12A(2)(a).

78 Section 12A(2)(d).

79 *Middleton v Carr* 1949 (2) SA 374 (A) at 386.

80 Section 82 of the Labour Act for the binding nature of collective agreements.

81 SI 70, 1996 which repealed the first such notice: SI 195/1986. In terms of the minimum wage notice, casual employees shall be paid not less than twice the normal wages paid to other employees (section 5(3) of SI 70/1996).

82 Rycroft & Jordaan (1992) pp. 72-75.

83 Section 108(4) of the Labour Act.

84 *R v Van Breda* 1933 SR 42, *S v Collett* 1978 RLR 203, *McLean v Risch* 1914 CPD 731.

to make deductions contrary to the Act is void and of no legal effect.⁸⁵ Section 12A of the Labour Act requires remuneration payable in money to be in 'legal tender', which in any country is determined by the relevant legislation.⁸⁶

An issue with remuneration is the so-called 'benefits' such as housing, transport (or use of a motor vehicle), a bonus, profit-sharing and others. These benefits are in two categories: *contractual* and *discretionary* benefits. A contractual benefit is a matter of contract and the employer has a legal obligation to provide it. Where a benefit is discretionary, it is at the absolute discretion of the employer, who may withdraw it at anytime and for any reason. The courts will not invoke the doctrine of legitimate expectation in order to convert a discretionary benefit into a contractual one. In *Foreman & Anor v KLM Royal Dutch Airlines*,⁸⁷ the employees' conditions of employment stated that they were eligible to apply for airline tickets at reduced rates but that the grant of such a reduced travel benefit was a privilege to which they were not entitled as of right. The conditions also stated that if they were refused the benefits they had to be informed of the reasons for the decision. When they were refused the benefit without being given reasons, they applied to court, contending that the benefit had become a right because it had never been refused before. The court rejected the contention, holding that the benefit remained discretionary despite having been previously granted. A privilege is not converted into a right merely on account of past practice. In other words, continuous practice does not take away the employer's discretion.

Bonuses are usually discretionary and, where this is so, past practice does not take away the employer's discretion to withdraw a bonus, unless the circumstances are such that there is a legitimate expectation on the part of the employee to be paid the bonus.⁸⁸ An 'acting allowance', is, for example, a discretionary allowance unless it is provided for in the contract of employment.⁸⁹

Where an employer assigns an employee additional tasks that are closely related to the employee's duties, there is no obligation to pay

85 *Bevcorp (Pvt) Ltd v Nyoni & Ors* 1992 H (1) ZLR 352(S).

86 See *McCosh v Pioneer Corporation Africa Ltd* 2010 (2) ZLR 211 (H).

87 2001 (1) ZLR 108 (H).

88 See generally *Minister of Information v PTC Managerial Employees Workers Committee* 1999 (1) ZLR 128 (S).

89 *Art Corporation Ltd v Moyana* 1989 (1) ZLR 304 (SC).

extra remuneration provided those tasks are carried out during normal working hours.⁹⁰ In *Maranatha Ferrochrome v Oswell Nyemba*⁹¹ the employee was employed as a salaries supervisor. His duties included monthly processing of salaries for employees, monthly processing and payment of all statutory returns and daily supervision of salaries clerks. He was assigned an extra duty that required him to process salaries for the employer's two subsidiary companies. This extra duty was performed during normal working hours for a period of thirty-five months. The employee demanded a 'responsibility allowance' for the extra-work. The employer refused. The Supreme Court held that there was no obligation on the employer to pay, as the extra work was closely connected to the employee's duties and was undertaken during normal working hours. The court refused to find an implied term that the additional duties would be paid for.

The contract of employment may provide for a review of remuneration from time to time. It is now well established that a salary review constitutes no more than a right for the employee to have the salary reconsidered. It does not give a right to an increase in salary.⁹²

An employee cannot have a legitimate expectation to be paid more than what he/she is supposed to be paid simply because other employees may be receiving even greater unjustified benefits.⁹³

Payment of remuneration to employees raises issues of mistake on the part of the employer. These are resolved in terms of ordinary principles of the law. Two examples are instructive. In *University of Zimbabwe v Gudza*⁹⁴ the University of Zimbabwe granted a salary increase to an employee. Later, it realized that it had made a mistake and had paid the employee a higher percentage increase than what she was entitled to receive. The employee did not realize the mistake. On ordinary principles of the law of contract, this was a case of a unilateral mistake. The law is settled: a contract cannot be set aside on the basis of a unilateral mistake unless the mistake is *justus* (reasonable and justifiable). The court held that the University's mistake was not *justus* and refused to set aside the

90 See *Maranatha Ferrochrome v Oswell Nyemba* SC 28/2012 at p. 4.

91 Ibid.

92 *Chiremba & Ors v Reserve Bank of Zimbabwe* 2000 (2) ZLR 370 (S).

93 *Martin Malunga & Ors v PTC* SC 117/1999.

94 1996 (1) ZLR 249 (S)

salary increase. In *City of Harare v Zimucha*⁹⁵ the employee had been absent due to illness. The employer knew he was sick and kept sending him medical forms to complete, which he never did. He was also asked to attend a medical board but never did. In spite of this, the employer kept paying his salary for about ten months. The employer then purported to dismiss the employee summarily and retrospectively. It sought to recover the salary paid during the ten months when the employee was absent on the ground that the payments were made under the erroneous belief that they were due. On ordinary principles of law, this raised an issue of unjust enrichment. Money paid out of a mistake of law or fact is recoverable under the *condictio indebiti*. The court refused to give an order to recover the salary paid because the requirements of the *condictio indebiti* had not been met. In particular, there was no mistake – the employer knew that the payments were not strictly due. The employer hoped the employee would regularize the situation by submitting sick-leave forms. The fact that it did not materialize could not create a mistake on the part of the employer.

To provide safe working conditions

Under the common law, the employer is required to provide safe working conditions by taking reasonable steps to ensure the safety of employees.⁹⁶ This duty merely requires the employer to provide a reasonably safe environment including safe machinery and tools. It was said in the case of *Baker v Union Government* that, ‘The employer is not an insurer. He is not bound to furnish the safest machinery, nor to provide the best possible means for its operation, in order to relieve him from responsibility.’⁹⁷

The duty is essentially a delictual one, although it is also an implied term of the contract of employment. In England it has been held that the employer is required to take care in choosing staff and will be liable for exposing an employee to injury caused by fellow employees.⁹⁸ It has been held further that the duty extends to an obligation to ensure that the employee is not so overworked as to be exposed to mental stress. This

95 1995 (1) ZLR 285 (S).

96 *Van Deventer v Workmen’s Compensation Commissioner* 1962 (4) SA 28 (T); *Baker v Union Government* 1930 TPD 120.

97 At p. 129.

98 *Hudson v Ridge Manufacturing Co. Ltd* [1957] 2 QB 348.

is so even where the employee is merely working in accordance with contractual commitments regarding hours of work.⁹⁹ The obligation to provide a safe working environment is now a matter of statute where the obligation is strict.

To provide leave

Under the common law, the employer is under no obligation to grant leave.¹⁰⁰ The obligation to grant leave arises either from contract or statute and it is instructive to consider the issue of leave under its four main categories: vacation leave, sick leave, special leave and maternity leave.

Vacation leave

Under the Labour Act, an employee is not entitled to paid vacation leave in the first year of service with an employer.¹⁰¹ Paid vacation leave only accrues after the completion of the first year of service at the rate of one twelfth of the period of service starting at the beginning of the second year of service. In other words, the first year of service is not taken into account in calculating paid vacation leave accrual. This position arises from the definition of 'qualifying service' in section 14A(1) which is as follows:

'qualifying service' in relation to vacation leave accrued by an employee, means any period of employment following the completion of the employee's first year of employment with an employer.

An employee is entitled to accumulate paid vacation leave up to a maximum of 90 days.¹⁰² This means that an employee may decide not to take vacation leave for up to three years. Any vacation leave which accrues beyond the 90 days is forfeited. Vacation leave may accrue up to a maximum of 90 days at a time.

Weekends and public holidays falling within a period of vacation leave are counted as part of the vacation leave.¹⁰³ An employee who becomes ill or is injured during a period of vacation leave may cancel the vacation

99 *Johnstone v Bloomsburg Health Authority* [1992] 1 QB 333; *Walker v Northumberland County Council* [1995] IRLR 35.

100 *East London Municipality v Thomson* 1944 AD 56.

101 Section 14A(2).

102 Section 14A(2).

103 Section 14A(3).

leave and apply for sick leave.¹⁰⁴ May an employer force an employee to take vacation leave that has accrued? The answer is no. The provision on the forfeiture of paid vacation leave beyond 90 days is a statutory penalty designed to encourage employees to take the unforfeited vacation leave. If an employee is prepared to forfeit vacation leave in terms of the Act, he or she cannot be forced to take vacation leave. To do so would offend against the employee's right to 'fair' labour practices protected by section 65 of the Constitution.

May an employer regulate the timing of the taking of vacation leave by an employee? The answer is yes. The timing of vacation leave is not entirely at the disposal of the employee. As long as the employer's regulation of the timing of the vacation leave is reasonable, the employer would be acting lawfully by refusing to grant vacation leave at stated times. Reasonableness is judged by having regard to the operational and business requirements of the employer and to the scope of the employment relationship. It is for this reason that section 14A(2) of the Labour Act refers to vacation leave being 'granted'.

The fact that paid vacation leave may be accrued up to a maximum of 90 days does not entitle the employee to payment in lieu of leave. The employee is merely entitled to take the paid vacation leave at an appropriate time.

The right to vacation leave may arise by way of contract. Most collective bargaining agreements provide a right to vacation leave, and by operation of law this is incorporated into the relevant individual contracts of employment. In most contracts, vacation leave accrues after the completion of the employee's first year of service. An employee who fails to complete the first year of service, in the absence of a contrary provision, is not entitled to a *pro rata* leave for the period worked.¹⁰⁵ Leave may be granted to run concurrently with the period of notice of termination.¹⁰⁶

Sick leave

As already noted, under the common law absence due to illness is not a breach of the contract of employment except where the illness is pro-

104 Section 14A (4).

105 *Carstens v Ferreira* 1954 (4) SA 704 (T) at 706]. Similarly there is a *pro rata* entitlement to leave before the completion of the specified period.

106 *Carstens v Ferreira*.

tracted and the absence has become unreasonably long.¹⁰⁷ However, the 'no work, no pay' principle still operates, notwithstanding no breach of contract. Sick leave is now completely regulated by statute, leaving little room for the common law.

In terms of the Labour Act, sick leave is available when the employee is ill or injured or undergoing medical treatment not arising from a failure to take reasonable precautions.¹⁰⁸ However, sick leave is not automatic: the employee must request it and the request must be supported by a certificate signed by a registered medical practitioner.¹⁰⁹ The request by the employee need not be in writing, and may be made on his or her behalf by an authorized agent. The expression 'medical practitioner' is not defined in the Labour Act and may be taken to include a traditional medical practitioner who is registered under the relevant legislation.

There is no minimum qualifying period for sick leave. Thus, any employee, regardless of the length of service with a particular employer, is entitled to sick leave if he or she is ill, injured or undergoing medical treatment not arising from a failure to take reasonable precautions. In any one year, sick leave may be granted for up to ninety days – including weekends, public holidays and other non-working days – on full pay.

If, in any one-year period, the employee has used up the maximum period of 90 days sick leave on full pay, there is no automatic entitlement to unpaid sick leave. The employee must make a request for it which must be accompanied by a signed certificate in which the medical practitioner expresses the opinion that 'it is probable that the employee will be able to resume duty' after the further period of sick leave.¹¹⁰ If the medical practitioner is of the view that the employee will probably not be able to recover and resume duty after the further period of sick leave, there is no entitlement to unpaid sick leave.

If the employee is granted unpaid sick leave in terms of section 14(3), the maximum period or aggregate periods of sick leave is 180 days in any one year.¹¹¹ Where the employee is not entitled to unpaid sick leave under section 14(3), the maximum period or aggregate periods of sick leave is 90 days in any one year.

107 See footnote 6.

108 Section 14B(1).

109 Section 14B(2).

110 Section 14(3).

111 Section 14(4)(b).

The significance of the maximum statutory period of sick leave is that if, beyond that period, the employee is unable to attend to his or her duties owing to illness or injury or is undergoing medical treatment, the employer may terminate the employment.¹¹² However, the termination must comply with the dictates of fair dismissal.¹¹³

Parties are free to agree to more favourable conditions of sick leave than those in section 14B and where this is so, those conditions prevail.¹¹⁴

Special leave

The Labour Act has provision for what it terms ‘special leave’, a category designed to accommodate a range of circumstances.¹¹⁵ An employee is entitled to twelve days of special leave in any calendar year.¹¹⁶ This covers leave for trade union purposes, compassionate leave and paternity leave. Section 14B provides in full as follows:

Special leave on full pay not exceeding twelve days in a calendar year shall be granted by an employer to an employee –

- (a) who is required to be absent from duty on the instructions of a medical practitioner because of contact with an infectious disease;
- (b) who is subpoenaed to attend any court in Zimbabwe as a witness;
- (c) who is required to attend as a delegate or office-bearer at any meeting of a registered trade union representing employees within the undertaking or industry in which the employee is employed;
- (d) who is detained for questioning by the police;
- (e) on the death of a spouse, parent, child or legal dependant;
- (f) on any justifiable compassionate ground.

Weekends and public holidays falling within a period of special leave are not counted as part of the special leave. This arises from the

112 Section 14(4).

113 See Chapter 5..

114 *Zimasco (Pvt) Ltd v Maynard Marikano* SC 6/2014.

115 Section 14B.

116 Ibid.

basic principles of statutory interpretation, particularly the maxim: *expressio unius, exclusio alterius*. The fact that the Legislature made specific provision for the inclusion of weekends and public holidays in vacation leave while remaining silent on special leave leads to the inescapable conclusion that these are not counted. It is also a matter of common sense. The reference to a 'calendar year' is significant. Special leave is available for up to twelve days in every calendar year, regardless of the employee's length of service. Special leave does not accrue nor can it be accumulated. It is circumstance-driven. As long as circumstances exist which entitle an employee to special leave, the leave must be granted if the employee has not exhausted the twelve days in that calendar year.

Although not stated in section 14B, the circumstances triggering the request for special leave must be proven to the satisfaction of the employer and the period requested must be reasonable. An employer must act reasonably, both in assessing the circumstances presented by the employee and in determining the period for the special leave in relation to a particular request.

Some categories of leave falling under special leave are worth commenting on. Leave for trade union purposes available in terms of 14B(c) is of very limited scope. It is only available to an employee who is a 'delegate or office-bearer' at any meeting of a registered trade union representing employees within the undertaking or industry concerned. It does not cover leave for an office-bearer or a trade union official to perform the functions of his or her office outside attendance at meetings.

Compassionate leave is limited to the death of a spouse, parent, child or legal dependant. Where special leave is required in the case of the death of a close relative falling outside the four mentioned, reliance must be placed on 'any justifiable compassionate ground' in section 14B. It is also this basis of 'any justifiable compassionate ground' that may support a request for paternity leave.

Maternity leave

The common law knows no maternity leave. Maternity leave is a matter of legislation. A female employee's right to maternity leave is protected by the Constitution. Section 65(7) states:

Women employees have a right to fully paid maternity leave for a period of at least three months.

There are two points to note about this provision. First, it does not follow that the obligation to pay during maternity leave falls on the employer. It may fall on the State. Secondly, the right is not absolute. It is one that may be limited in terms of section 86 of the Constitution. The Labour Act is the primary law that provides the full scope and limits of the right to maternity leave.

Maternity leave is provided for by section 18 of the Labour Act. Maternity leave plays a critical role in gender equality law. The extent of protection of women who go on maternity leave is a key determinant of the adequacy or otherwise of gender equality laws. Zimbabwe's maternity leave provisions in the Labour Act are reasonably adequate. The following features of maternity leave law are worth outlining:

- The obligation to pay for maternity leave is on the employer.
- The period of maternity leave permitted by the law is 98 days. This maternity leave is on full pay.¹¹⁷
- There is a qualifying period for a female employee to be granted paid maternity leave. She must have served the employer for at least one year.¹¹⁸ This does not appear to be an unreasonable restriction on the right granted by section 65(7) of the Constitution.
- There is a limitation on the entitlement to paid maternity leave: it must be spaced at the rate of once every 24 months and in any event, only three maternity leaves are permissible with any one employer. Any maternity leave outside this limitation may be unpaid.¹¹⁹ Whether or not this may survive a challenge based on section 65(7) of the Constitution remains to be seen.
- Sick leave may not be granted once paid maternity leave has begun or during a period of unpaid maternity leave unless the sick leave is for medical reasons other than maternity.¹²⁰
- In general, a female employee is entitled to choose the precise moment she takes her maternity leave. However, this is subject to two conditions:

- (i) leave cannot be taken more than 45 days before the expected date of delivery, and

117 Section 18(1).

118 Ibid.

119 Section 18(3).

120 Section 18(b).

(ii) it is mandatory for leave to be taken at least 21 days before the birth of the child.¹²¹

- The employee may request maternity leave in excess of the 98 days prescribed under the Act. It is up to the employer to accept or reject the request but the maternity leave granted may be unpaid.¹²²
- During the period of maternity leave, the employee is entitled to all her normal benefits, including her right to seniority or advancement and the accumulation of pension rights. The period of maternity leave cannot be regarded as an interruption for purposes of any continuous service required for promotion or seniority.¹²³
- An employee who is back at work after her maternity leave is entitled to one hour of nursing time each day during working hours for a maximum period of six months. Nursing time is only available if the female employee is the mother of a suckling child.¹²⁴

The law on maternity leave still raises some problematic issues which may require re-examination for gender discrimination purposes. Firstly, the cost of maternity leave is borne exclusively by the employer. There is no social security or social insurance system catering for maternity benefits and the employer is obliged by law to pay the employee's salary as aforesaid. Article 4 of Convention 103 outlaws this approach by providing that under no circumstances should an employer be individually liable for the costs of maternity benefits. The rationale behind this ILO convention is the need to eliminate the obvious disincentive to the employment of women which comes with visiting all costs on the employer.

While the current approach of making the employer individually liable seems unavoidable in view of the absence of a well developed social security system in Zimbabwe, there can be little doubt that the approach affects women in so far as some employers take into account this cost element in preferring the employment of men to that of women. In that event, it limits women's access to employment. In the long term, a compulsory social insurance scheme contributed to by both employers and

121 Section 18(2).

122 Section 18(5).

123 Section 18(7).

124 Section 18(8), 18(11).

employees (both male and female) should be introduced.

Secondly, the requirement that maternity leave be spaced at the rate of every 24 months appears unnecessary in view of the overall limit of three maternity leaves with any one employer. While the latter limitation appears sensible from a demographic standpoint, the same cannot be said for the former. Given a ceiling of three maternity leaves, there is no sound reason why further restrictions should be imposed, as this would prejudice all those women who, out of design or otherwise, fail to adhere to the statutory spacing period. This may be an infringement of the right protected by section 65(7) of the Constitution.

Thirdly, the Act is not clear on the job security of women who fail to meet the rigid requirements of the Act. For instance, what happens to an employee who has a fourth pregnancy under the same employer? Or one who has a second pregnancy within 24 months? Some may want to believe that such employees are entitled to unpaid maternity leave so that they retain their jobs but this is an erroneous view. A better view is that the Act does not provide a right to unpaid maternity leave at all and a female employee may lose her job should the employer decide to terminate her employment.

Finally, it is not clear whether the one year of service has to be continuous, for if it does, employers can effectively deny women the right to go on maternity leave by employing them on short term contracts with some convenient breaks in between. Even though the term 'continuous service' does not appear in the legislation, a court can easily read it into the Act on the basis that the very act of insisting on a minimum period of service means that the lawmakers were anxious to grant maternity benefits only to some 'permanent' employees. More fundamentally, the requirement of one year of service raises problems for part-time workers who work less hours in a week than full-time employees. When is the one year completed? Is it after completing the requisite aggregate number of hours for a year, which would possibly take them up to three years? Or is it merely after the completion of one year?

To respect the employee

It is an implied obligation of the employer to treat the employee with due respect as a human being¹²⁵. This obligation has been used in South Africa to deal with situations of employers uttering racially derogatory

125 *Jamieson v Elsworth* 1915 AD 115 at 120.

remarks. Thus an employer breaches this duty if an employee is treated in any way that is an affront to human dignity.¹²⁶

To observe statutory rights of the employee

Employees are entitled to a number of rights and employers are obliged to respect these rights. They include:

- (a) the right to join a trade union and to engage in the lawful activities of such trade union (section 4 (1));
- (b) the right to be a member of a workers' committee and to participate in the lawful activities thereof (section 4(1));
- (c) the right not to be discriminated against on grounds of race, tribe, place of origin, sex, etc. (section 5);
- (d) the right to fair labour standards (section 6);
- (e) the right to democracy in the workplace (section 7).

Any breach of these statutory rights entitles the employee to statutory remedies such as an action for an unfair labour practice under section 93 of the Act.

Promotion of an employee

An employer has no obligation to promote an employee except in circumstances where the employer creates a legitimate expectation in the mind of the employee that he/she would be promoted.¹²⁷ A legitimate expectation does not arise merely because the employee has acted in a position for a long time.¹²⁸ It is not an unfair labour practice not to promote an employee who has acted for a long time.¹²⁹

In *Mudarikwa & Anor v Director of Housing & Community Services & Anor*¹³⁰ the employees had been acting as district officers in the Harare municipality. A recommendation had been made by their immediate superior that they be confirmed in their positions but the recommendation was withdrawn when it was found that they did not have the educational qualifications required for the posts. These were then advertised in the

126 *United African Motor & Allied Workers Union v Fodens (SA) (Pty) Ltd* (1983) 4 LC 212.

127 *Muwenga v PTC* 1997 (2) ZLR 483 (S)

128 *Ibid.*

129 *Ibid.*

130 2007 (1) ZLR 41 (S).

media and the employees also applied. They were not invited to the interviews. They sought an interdict preventing the employer from appointing anyone else to the posts. They also sought an order to be promoted. It was held that they did not have a right to be promoted. Further, there was no basis for their claim of having a legitimate expectation to be promoted: they did not have the qualifications and so could not have a 'legitimate' expectation.

Unfair labour practice

The constitutional right to fair labour practices belongs to both employees and employers. This right necessarily imposes a duty on both parties not to infringe the right. The Labour Act specifies a number of acts that are regarded as 'unfair labour practices'. Not everything that is 'unfair' is an unfair labour practice under the Labour Act. To be an 'unfair labour practice' an action must be specifically described as such by the Act. In other words, one has to point to a specific provision within the Act that prescribes the action as an 'unfair labour practice'. If a practice is not specified as unfair in the Labour Act, it cannot be raised as an 'unfair labour practice' under the Act; but it may be an infringement of the right to fair labour practices protected by the Constitution. In the latter context, the remedy lies in raising an action based on the Constitution. An individual employee cannot commit an 'unfair labour practice' under the Labour Act. The unfair labour practices under the Labour Act can only be committed by an employer or a trade union or workers' committee.

Unilateral variation

An employer cannot unilaterally alter terms and conditions of employment.¹³¹ Where an employer unilaterally introduces new terms, an employee has two choices: either to reject the new terms and insist on old terms or to accept the new terms and relinquish the old terms.¹³²

Vicarious liability for wrongful acts of employee

An employer is jointly and severally liable with an employee for wrongful acts of the latter committed in the course of employment. This liability is called vicarious liability.¹³³ Why impose this liability on the employer?

131 *Rachel Stewart & Ors v The Vice-Chancellor of the University of Zimbabwe & Anor* SC 97/2001.

132 *Ibid.*

133 See L. Madhuku (1994)..

The explanations fall under three categories:¹³⁴ a theory of justice which says that it is only fair and right that the employer should compensate for the delicts of his employee because, being the beneficiary of the employee's services, he should be the bearer of the losses; a theory of deterrence which holds that if an employer is made responsible for the delicts of his employees he will be encouraged to prevent such occurrences by taking the necessary steps; and a theory of social insurance which argues that vicarious liability is an economical way of distributing risk among the members of society at large.

There has been no clear judicial choice among the three to explain the real basis of vicarious liability. Each explanation has its own problems. As regards the theory of justice, there is the perennial problem of determining what justice really entails. Further, there is no necessary correlation between an employer's benefit from an employee's services and any losses that may arise as a result of vicarious liability.¹³⁵ The main problem with the deterrence theory is that it is conceptually illogical to talk about deterrence where there is no fault. The theory of social insurance is the most attractive in that it recognizes the desire of judges to extract an effective remedy. It is usually the case that the employer is more likely than the employee to have the resources to make compensation. It has been aptly said that the employer is 'made liable because his pocket is deeper than the employee's'.¹³⁶ A weakness of the theory as identified by Williams and Hepple is that it gives a licence for an unacceptable judicial legislation. They argue that creating social insurance is essentially a political task that is outside the province of the judiciary.¹³⁷ With respect, this is unconvincing. It may well mean that the doctrine should be jettisoned altogether as it has no other foundation than risk distribution. The point is that the doctrine as created cannot be justified on logical grounds. It was created as a social policy tool and it is too late to invoke sentiments of the separation of powers between the judiciary and the politicians.

There is no substantive difference between the theory of justice and the theory of social insurance. In essence, both are saying that it is only fair and just that the risk of losses created by the employee be borne by the employer as the employee is 'about the employer's affairs'. As Pol-

134 Williams and Hepple (1984) p. 133.

135 Ibid.

136 Ibid.

137 Ibid. at 135.

lock clearly noted:

I am answerable for the wrongs of my servant or agent, not because he is authorized by me or personally represents me. But because he is about my affairs, and I am bound to see that my affairs are conducted with due regard to the safety of others.

This is consistent with a risk-bearing function of the employer.

In *Lewis v Salisbury Gold Mining Company*, Kotze CJ emphasized that ‘[the doctrine’s] general recognition is its best claim to being founded in sound policy and justice’.¹³⁸ In *Feldman (Pty) Ltd v Mall*,¹³⁹ Watermeyer CJ said:

A master who does his work by the hand of a servant creates a risk of harm to others if the servant should prove to be negligent or inefficient or untrustworthy ... because he has created this risk for his own ends, he is under a duty to ensure that no-one is injured by the servant’s improper conduct or negligence in carrying on his work.

It is submitted that this focus on the social policy of risk distribution underpins the way the doctrine of vicarious liability has developed. Its scope can, and should, be understood within this framework.

An employer is vicariously liable for the delicts of his employee if two conditions have been satisfied: the employee is a ‘servant’ within the conception of the common law and that the employee was acting in the course of his employment when the delict was committed. The requirement of a ‘servant’ relationship is designed to exclude independent contractors from the scope of an employer’s liability.

Once it is established that an employee was a servant then the second question arises: were they acting in the course and scope of their employment? This requirement has generated some difficulties and uncertainties. However, a number of propositions are clear. Firstly, whether or not an employee was in the course of his employment is a question of fact to be determined by the court in the circumstances of the case.¹⁴⁰ Secondly, an act found to be necessary for the carrying out of the employee’s in-

138 [1984 1 O.B 1, at 20.

139 1945 A.D. 733 at 741.

140 *Canadian Pacific Railway Co. v Lockhart*, above; *Nott v ZANU (PF)*, 1984 (2) ZLR 208..

structions will invariably be held to be within the scope of employment. In each case the facts have to be ascertained and analyzed. For instance, in the leading case of *Mkize v Martens*,¹⁴¹ the defendant employer was a transport driver who employed two servants to assist him in his transport service. He undertook to feed them on their journeys. He was held liable for damage caused by a fire that the servants had lit, in the course of such a journey, for the purpose of cooking their afternoon meal. They had negligently allowed the fire to spread. Lighting the fire was held to be a necessary act for carrying out the instruction of preparing their meal.

Thirdly, where a servant deviates from the scope of his employment to do what has been called ‘a frolic of his own’, that is not sufficient to place him out of the scope of his employment. What has to be looked at is the degree of deviation, and whether it ‘is not so connected with the authorized act as to be a mode of doing it, but is an independent act...’¹⁴² Thus in *Nott v ZANU (PF)*,¹⁴³ a ZANU (PF) servant, employed to drive a vehicle and instructed to take a certain person for treatment at a clinic, was held to be within the scope of his employment when he deviated for some eight kilometres to collect his personal papers. In the course of that deviation he negligently caused a collision and ZANU (PF) was made vicariously liable. As Beck JA put it after examining South African and English decisions:

*The assertion that it is the degree of the servant's deviation that lies at the heart of the question of the master's liability is therefore common to all judgments... I turn to consider whether the circumstances of [the servant's] deviation from the strict performance of the functions to which he was appointed generally, and on that morning in particular, was of such a degree that it cannot reasonably be said that he was still exercising some of those functions when he negligently caused the plaintiff damage.*¹⁴⁴

Similarly in *Biti v Minister of State for Security*,¹⁴⁵ the driver of a Government vehicle was instructed to take three Government officers

141 1914 AD 382.

142 *Canadian Pacific Railway Co. v Lockhart* at p. 599.

143 1983 (2) RLR 208.

144 1984 (2) S.A. 115 at 120.

145 1999 (1) ZLR 165 (S).

home after work and then keep the vehicle safely overnight. He was to pick up the same officers in the morning and drive them to work. After dropping the officers, he deviated and engaged in activities of his own, which included picking up his girlfriend and drinking. In the process, he was involved in an accident in which he damaged the plaintiff's car and severely injured the plaintiff. It was held that although the driver had deviated from his authorized route, the deviation, in terms of time and space, was not such as to convert it into 'a frolic of his own'. The employer was held vicariously liable.¹⁴⁶

Fourthly, and following on the third proposition, the mere fact that the servant did an act in the face of clear instructions from an employer not to do so does not necessarily absolve the latter from vicarious liability. As Wessels JA aptly noted in *Estate Van der Byl v Swanepoel*,¹⁴⁷ 'The law is not as futile as to allow a master, by giving secret instructions to his servant, to discharge himself from liability.' What has to be ascertained is whether the instructions merely define the mode of performing a particular task (in which case the employer is liable even where the instructions are disobeyed) or the instructions define the scope of employment (in which case the employer is not liable if instructions are disobeyed).¹⁴⁸ In *Wentworth-Wear v Zvipundu*,¹⁴⁹ the appellant was injured in a motor vehicle accident caused solely by the negligence of the driver of a commuter omnibus. The respondent was the driver's employer. The employer claimed that the driver had been discharged from employment but had nonetheless driven the vehicle, directly contrary to instructions. The court held that the employee had disregarded a prohibition that limited the sphere of his employment and not merely regulated his conduct within the sphere of his employment. The employer was held not vicariously liable. The rationale is that disobeying instructions meant to define an employee's mode of performance is essentially an improper mode of performing the duty rather than placing it outside the course of employment. This is consistent with the strict liability basis of the doctrine itself.

Fifthly, and logically arising from the fourth proposition, the mere fact that an employee commits an offence while about the employer's duties

146 See also *NSSA v Dobropoulos & Sons (Pvt) Ltd* 2002 (2) ZLR 617 (S).

147 1927 A.D 141 at 151.

148 See *South African Railways v Marais* 1950 (4) S.A. 610 (A.D); *Wentworth-Wear v Zvipundu* 2000 (1) ZLR 281 (S).

149 Ibid.

does not *ipso facto* place him outside the course of his employment. The question in each case is whether the commission of the criminal offence is merely an improper mode of performance of duty or so independent as to place the employee out of the course of his employment. This emerges quite clearly from the leading English case of *Morris v Martin & Sons Ltd*,¹⁵⁰ where the plaintiff's coat had been sent to a firm of cleaners and was stolen by the employee whose job it was to clean it. The employer was held liable for the theft as this was held to be an improper mode of the employee's performance of his duty.

An interesting case in Zimbabwe is *Fawcett Security Operations (Pvt) Ltd v Omar Enterprises (Pvt) Ltd*.¹⁵¹ The facts of this case were simple. The appellant carried on the business of providing both uniformed and plain-clothed security officers on hire for reward. In October 1987, it entered into a contract with the respondent to provide a plain-clothed security guard at the latter's supermarket, with the responsibility of detecting and preventing shoplifting and other theft occurring at the respondent's premises. The security guard, while on duty for his employer, stole goods from the very supermarket he was guarding. The issue before the Supreme Court was whether, in so stealing, the security guard could still be regarded as acting in the course of employment such as to make the employer vicariously liable. Notwithstanding the principles outlined above, the Supreme Court held that the stealing was in this case sufficient to place the employee outside the scope of his employment. Fawcett Security was therefore not liable. The basis of the decision was stated by Gubbay CJ, who delivered the unanimous judgment (McNally JA and Manyarara JA concurring) in the following terms:

*Accordingly, as I perceive the law, in order to render the employer vicariously liable for the theft of goods by the employee, the goods must in some way or other have been entrusted into the possession or charge of the employee. The culpable employee must be one to whom the custody of the goods was deputed by his employer, not just any employee whose employment simply afforded him the opportunity to steal them.*¹⁵²

150 [1966] 1 QB 716.

151 1991 (2) ZLR 291 (SC).

152 At 298A.

This formulation was said to derive from a number of English cases.¹⁵³

With respect, it is submitted that this formulation is not easily supportable from the English authorities. In fact it is more likely that the English courts would have found the employer vicariously liable in the circumstances of *Fawcett Security*. Indeed, such a finding would be consistent with the general survey of the Zimbabwean law made above. The decision in *Fawcett Security* is based on a wrong reading of the authorities. It is submitted that the proper *ratio decidendi* of the English cases is wider than the concept of the employee being 'entrusted' with the goods by the employer. It is instructive to note that none of the English cases uses the word 'entrusted.' This word is an invention of the Zimbabwe Supreme Court. What the English cases can safely be said to be putting forward is the proposition that a mere opportunity for the employee to reach the goods is not enough because what is required is that the employee should have 'something to do with' the goods. Being 'entrusted' with the care of the goods is one such thing but not everything. For instance, in *Morris v Martin & Sons Ltd.*, the case most heavily relied upon by Gubbay CJ, was not strictly a case of entrusting the employee with the care of the goods. The employee's duty was to clean the fur coat, which is the 'something' about the goods required for English cases. In the *Leesh River Tea* case the stevedores were not entrusted with the care of the cargo. The 'something' they had to do with the cargo was loading it. In the *Rustenburg Platinum Mines* case, the loading of the cargo was a sufficient 'something' to make the employer vicariously liable for the theft by the employee. The issue is always one of degree, so that following these authorities, guarding goods from theft (as in the *Fawcett Security* case) is, it is submitted, the requisite 'something' that is required to generate vicarious liability for the employer. There is no conceptual difference between 'guarding goods' and 'loading goods'. Accordingly, it is difficult to see how it can be said that stealing goods one is guarding is not so bound up with the duty of guarding the goods. It is on this basis that it is submitted that the better view in a case such as the *Fawcett Security* case is to hold the employer vicariously liable on the strength of the very English cases the court used to arrive at the contrary view.

153 Particularly *Morris v Martin & Sons Ltd.* [1966] 1 Q.B 716, *Rustenburg Platinum Mines Ltd & Ors v South African Airways and Pan American World Airways Inc.* 1979 1 Lloyd's Rep 19 (C.A.), and *Leesh River Tea Co. Ltd & Ors v British India Steam Navigation Co. Ltd* [1966] 3 All E.R 593 (C.A.).

If the English cases are not read in the manner advocated here, it would become difficult to explain why they make the employer liable even where the employee has committed fraud¹⁵⁴ or a violent intentional crime.¹⁵⁵ The explanation is that as long as the employee's duties have 'something' to do with the goods, beyond giving him a mere opportunity to steal them, then their theft will bring forth vicarious liability for the employer. On this basis, the *Fawcett Security* case was wrongly decided.

In case this first limb of the argument is wrong, it is submitted that there is a case for arguing that the decision is out of line with the Roman-Dutch law approach. Under classical Roman-Dutch law it would appear that an employer is liable for the acts of the employee as long as the employee is performing them when he is 'about the affairs' of the employer. For instance, a guard who steals the goods he is supposed to guard is clearly still 'about the affairs' of the employer and the latter is vicariously liable. The emphasis of Roman-Dutch law is on the employer's selection of the employee.¹⁵⁶

Instructively, the position in South Africa, although narrower than the classical Roman-Dutch law position, would still not support the Zimbabwe Supreme Court decision in *Fawcett Security*. The South African position appears clearly from a searching analysis by Mooyesen J in *Hirsch Appliance Specialists v Shield Security Natal (Pty) Ltd*. The case also involved theft by security guards of goods from the very premises they were supposed to guard. The employer was held vicariously liable. There was no question that the goods were 'entrusted' to the employee. In summarizing the law, the judge stated:

*Where an employer is, unlike an ordinary citizen, indeed under a legal duty to be his brother's keeper or the guardian or custodian of his brother's goods, and he entrusts that function to a servant who not only omits to perform his duty but causes the very injury which it is his and his master's duty to prevent, then, as a general rule, the master will be held liable.*¹⁵⁷

154 *Barwick v English Joint Stock Bank* [1867] L.R. Ex 259.

155 *Keppel Bus Co. Ltd v Sa'ad bin Ahmad* [1974] 1 WLR 1082.

156 For a discussion of the Roman-Dutch Law see Zimmerman, op. cit., at 1123, particularly his submission that the Roman-Dutch law approach was ignored because South African courts followed English law at a very early stage without bothering to research the Roman-Dutch authorities.

157 1992(3) SA 643 (D).

It may be recalled that in the *Fawcett Security* case, the security guard was entrusted with his employer's duty of preventing theft of goods in the supermarket. He ended up stealing those very goods. It is submitted that the decision in *Hirsch Appliance Specialists*, while narrower than the classical Roman-Dutch position, is the better view of the law in the area. Again on this basis, the *Fawcett Security* decision is open to criticism.

It has been shown above that the doctrine of vicarious liability is not a by-product of the 'logic' of the law but a social policy doctrine of risk distribution. The words of Fleming are worth recalling:

*... a person who employs others to advance his own economic interest should in fairness be placed under a corresponding liability for losses incurred in the course of the enterprise, that the master is a more promising source of recompense than his servant who is apt to be a man of straw, and that the rule promotes wide distribution of tort losses, the employer being a most suitable channel for passing them on through liability insurance and higher prices.*¹⁵⁸

It is arguable that it is this social policy orientation that accounts for the widening of the scope of liability from the narrow confines of *Mkhize v Martens* to the fairly wide approach recognized even in *Fawcett Security* itself. It is worth noting that in *Fawcett Security*, Gubbay CJ rejected an invitation to apply as a matter of public policy a rule of law that security firms cannot be exonerated from liability in circumstances such as were before him. However, he did not rule out the possibility of applying such a rule in an appropriate case.¹⁵⁹ It is submitted that such a rule of law, if it does not exist, should be created, as it is consistent with the social policy basis of vicarious liability. The decision in *Fawcett Security* makes a mockery of the very protection that vicarious liability was created to afford to victims of delictual acts.¹⁶⁰

158 Fleming (1987), p. 340.

159 Ibid.

160 See also *Phillips Central Cellars (Pvt) Ltd v Director of Customs and Excise* 2000 (1) ZLR 353 (H); *Rose NO v Fawcett Security Operations (Pvt) Ltd* 1998 (2) ZLR 114 (H).

CHAPTER FIVE

TERMINATION OF EMPLOYMENT:

(I) GENERAL

Introduction

Whether it is done under the common law or statute, there are various ways in which employment may be validly terminated. In Zimbabwe, as in other countries, it is necessary, owing to statutory interventions, to first understand the common law position in order to appreciate the scope of application of statutory law. There are situations where the common law is the only applicable law on termination of employment.

In the majority of cases, however, termination of employment is governed by statute, with little or no scope for the common law. In every case where termination of employment is the issue, the starting point is to answer the following question: what is the applicable law? Put differently, is it the common law or statute or a mixture of both? As a general rule, the common law applies if there is no clear statutory provision to the contrary.¹

Termination under the common law

This section of the common law must be considered with some caution in view of the inherent power of the Constitutional Court, Supreme Court and High Court to develop the common law. Some rules of the common law may give way to new concepts derived from the interests of justice and the spirit of the Constitution.

¹ See *Hama v National Railways of Zimbabwe* 1996 (1) ZLR 664 (S).

Termination by mutual agreement

A contract of employment may be terminated by agreement, provided the agreement is genuine or real.² The agreement need not be in writing. However, where an employee agrees to termination as a response to intolerable pressure by the employer, this may be regarded as ‘constructive dismissal’ and not termination by mutual agreement.

Effluxion of time

Contracts for a fixed duration terminate automatically on the expiry of the specified period.³

Completion of specified task

Where the contract of employment is for the performance of a specified task, the contract terminates automatically on the completion of that task.⁴

Supervening impossibility of performance

The general rule of the law of contract is that where performance has become impossible due to a *vis major* or *casus fortuitus*, the contract is terminated.⁵ Instances of supervening impossibility of performance in employment contracts are as follows:

Illness

Although absence due to illness is a form of *casus fortuitus*, it does not automatically lead to termination of employment.⁶ However, if the absence becomes unreasonably long, the employer is entitled to terminate the contract by merely electing to cancel it and treating it as at an end; no notice is required except that the employee should be informed of the election.⁷ The position of the law was stated explicitly in *Girjac Services (Pvt) Ltd v Mudzingwa*⁸ as follows:

A distinction must be drawn between absenteeism due to

2 *R v Van Breda* 1933 SR 42, *S v Collett* 1978 (3) SA 206 (RA); 1978 RLR 205 (A); *Strachan v Lloyd Levy* 1923 AD 670 at 671.

3 See Chapters 1 and 2..

4 *Bon Accord Irrigation Board v Braine* 1923 AD 480.

5 *Peters, Flamman & Co. v Kokstad Municipality* 1919 AD 427.

6 *Beretta v Rhodesia Railways Ltd* 1947 (2) SA 1075 (SR); *Boyd v Stuttaford* 1910 AD 101; *Girjac Services (Pvt) Ltd v Mudzingwa* 1999 (1) ZLR 243 (S) at 246 C.

7 *Beretta v Rhodesia Railways*.

8 1999 (1) ZLR 243 (S).

*illness or some other form of incapacity, and wilful abscondment. In the former situation, the employer cannot ex eo cancel the contract. Incapacity is not a breach of contract. Nonetheless, the fact that the employee is incapacitated by a cause beyond his control – by an act of God, if you like – does not deprive the employer of the right to terminate the contract where the absence was unreasonable.*⁹

Reasonableness depends on the circumstances of each case, but two factors are paramount: the nature of the business of the employer and whether the employee's absence may cause irreparable damage to the employer.¹⁰

Death

The employee's death automatically terminates the contract of employment.¹¹ The employer's death does not terminate the contract of employment – the estate remains liable for the payment of remuneration for the unexpired period of the contract.¹²

State action

An 'act of State', such as the arrest and imprisonment of the employee, may be a form of *casus fortuitus* leading to impossibility of performance. The law appears to be that such an impossibility does not lead to an automatic termination of employment; the period of absence must be unreasonable and the employer must elect to terminate the contract.¹³

Insolvency

The insolvency of the employer is regarded as a breach of contract of employment entitling the employee to cancel the contract and claim damages.¹⁴ Employees are given preference in respect of unpaid wages.¹⁵ The insolvency of the employee will normally not have an effect on

⁹ At p. 246C.

¹⁰ *Girjac Services (Pvt) Ltd (supra)*.

¹¹ *Boyd v Stuttaford & Co.* 1910 AD 101; *Reserve Bank of Zimbabwe v Siwawa Estate's Executor* 1999 (1) ZLR 185 (S).

¹² *Ibid.*

¹³ *Beretta v Rhodesia Railways* and *Girjac Services (supra)*; the suggestion in *Shlengemann v Meyer, Bridgen & Co.* 1920 CPD 494 is that termination is automatic but this was impliedly rejected by Gubbay CJ in *Girjac Services*.

¹⁴ *Clark v Denny* 1884 4 EDC 300.

¹⁵ Section 103 of the Insolvency Act [Chapter 6:04].

the contract of employment except where there is a contractual term to the contrary. However, where the insolvency affects the capacity of the employee to discharge his or her obligations, the employer is entitled to treat it as a supervening impossibility and cancel the contract.

By repudiation/constructive dismissal

In principle, an employee is entitled to terminate the contract summarily where the conduct of the employer amounts to repudiation, such as where the conduct renders continued employment intolerable.¹⁶

The common law concept of 'constructive dismissal' is purely contractual: an innocent party is entitled to elect to accept a repudiatory breach and cancel the contract. Thus constructive dismissal takes place where the employee, with or without notice, resigns in reaction to the employer's behaviour and still claims to have been dismissed. The employer's behaviour leading to resignation must amount to a repudiatory breach going to the root of the contract. Without a concept of 'constructive dismissal', the employer 'could make life so difficult for the employee that he has to leave, yet escape liability since he has not actually terminated his contract'.¹⁷ That constructive dismissal is part of our common law clearly emerges from case law. In *Mudakureva v Grain Marketing Board*¹⁸ the Supreme Court, without deciding the point directly, assumed that the English common law reflected our law.¹⁹ That assumption is well founded. In that case, the employee had been charged by the employer with various disciplinary offences. A hearing took place at the end of which he was told that the charges had been proved and that he would be dismissed. However, he was given an opportunity to resign to avoid dismissal. He chose to resign. Afterwards, he appealed to the management saying he had only resigned because he had been forced to do so. The management rejected his appeal. He then applied to the High Court for an order of reinstatement. In his application, he did not raise the issue of resignation. The High Court dismissed the application. On appeal, the Supreme Court held that he should have raised the question of whether or not his resignation amounted to constructive dismissal. In so holding, the Supreme Court was firmly of the view that constructive dismissal is

16 *Strachan v Prinsloo* 1925 TPD 709.

17 Honeyball, J. and S. Bowers, *Textbook on Employment Law* (2nd ed.) p. 111.

18 1998 (1) ZLR 145 (S).

19 At pp. 147F-148B.

part of our common law and relied on the English common law for this position.

Constructive dismissal may arise where the employee takes the option of resigning after a threat from the employer to ‘resign or be fired’.

The employee may also repudiate the contract. Repudiation by an employee may be inferred from his or her conduct. In *Kandoma v Shades of Black Cosmetics (Pvt) Ltd*,²⁰ Kandoma was the chairman of the workers’ committee. One day he was found by the Managing Director reading a booklet on horse-riding and betting, not working. When she questioned him, he became emotional and gave no satisfactory explanation. In the same month employees went on an unlawful strike. When questioned, they indicated it had been organized by Kandoma. The MD asked Kandoma about it. He again became emotional and told her to dismiss him if she liked. Subsequently the MD addressed a meeting attended by Kandoma and other employees where she stated that she found Kandoma not working in his office and that, as chairman of the workers’ committee, he should lead by example. This offended Kandoma. He wrote to the MD as follows:

At my age and my long time of working I feel guilty and shameful... I think you can decide something or to dismiss me from your company. How can you keep a lazy person at your workplace? How am I going to continue working with these youngsters? So I have left everything for you to decide.

Four days later, he saw the MD in her office and rudely told her that he was waiting for her to dismiss him and that she should dismiss him. The next day, she wrote to Kandoma:

I refer to your letter...[in] which you quoted a lot of things; and I quote your line which started that ‘I think you can decide something or to dismiss me from your company. How can you keep a lazy person at your work place?’ and again... you verbally said I should fire you. You are waiting for me to fire you, and that was your statement when you were standing in my office. Please be advised that under such circumstances the company can no longer keep you as from today...’

Although the matter was decided on other grounds, the Supreme Court had no hesitation in saying *obiter*, that Kandoma had repudiated the contract of employment.

20 SC 189/2006.

Summary dismissal

The common law gives the employer the right to terminate a contract summarily if the employee is guilty of conduct that amounts to a repudiation of the contract or a material breach of a term of it.²¹ The onus is on the employer to justify summary dismissal. Various grounds under the common law justify summary dismissal, such as insubordination, negligence, incompetence, dishonesty, breach of duty of good faith and absence from work.²² In *National Foods Ltd v Masukusa*²³, Korsah JA said:

*While there is no fixed rule as to what will justify summary dismissal, it is generally accepted that wilful disobedience to the lawful and reasonable order of the employer, or misconduct inconsistent with the due and faithful discharge of his duty to the employer or conduct which is incompatible with the faithful discharge of his duty to the employer or prejudicial to the business of the employer, may justify summary dismissal.*²⁴

A wrongful summary dismissal does not have the effect of an automatic termination of the contract of employment. The employee has a choice: either to accept the repudiatory breach and sue for damages or reject it and continue to affirm the contract. Gwaunza JA had this to say in *Thomas Meikles Stores v Mwaita & Anor*:²⁵

On the authority of these statements of the law, it is evident that the respondents' contracts of employment were not brought to an end by the mere fact of their repudiation by the appellant. The contracts, in my view, came to an end when, by their conduct, the respondents effectively cancelled them.

Termination on notice

A contract of employment may be terminated by the giving of notice.

21 *Zieve v National Meat Supplies Ltd* 1937 AD 177 at 190; *Cotler v Variety Travel Goods (Pty) Ltd* 1974 (3) SA 621 (A) at 628 B; *Council for Scientific and Industrial Research v Fijen* 1996 17 ILJ 18(A).

22 See section under duties of employees.

23 1994 (1) ZLR 66 (S).

24 At 69B.

25 2007 (2) ZLR 185 (S) at 192F.

Where the period of notice is not specified in the contract, reasonable notice must be given.²⁶ In practice, the period of payment of wages determines the reasonableness of notice.²⁷ The employer can terminate the contract for any reason or even for no reason and has no obligation either to reveal the reason for dismissal, or to justify it.²⁸ An employer is entitled to pay an employee in lieu of notice, thus terminating the contract with immediate effect.²⁹ Notice is a unilateral act that does not require acceptance and cannot be withdrawn without agreement.³⁰

Resignation of employee

With or without giving the requisite notice, an employee may resign. A resignation need not be in writing.³¹ It has been held that a resignation is a unilateral act requiring neither acceptance nor rejection by the employer.³² The resignation takes effect as soon as it has been communicated to the correct person or authority.³³ It cannot be withdrawn without the consent of the employer. This is clearly correct where resignation is with the requisite notice. The position is fraught with conceptual problems when applied to cases where the resignation is in breach of contract, such as where the employee has not given the requisite notice. The general principle in the law of contract is that a repudiatory breach needs to be accepted by the innocent party in order to terminate the contract.

This is sometimes described as the ‘bilateral’ or ‘elective theory’ of termination of contract. However, there has also developed the ‘auto-

26 *Tiopaizi v Bulawayo Municipality* 1923 AD 317 at 326.

27 *Ibid.*

28 See, however, for contrary views: Rycroft (1989) p. 270; Pretorius and Pitman, (1990) p. 133.

29 *Gracie v Hull & Blythe Co. SA Ltd* 1931 CPD 539 at 541; *Crawford v Tommy* 1906 TS 843.

30 *Rustenburg Town Council v Minister of Labour* 1942 TPD 220; *de Vos v Monnik & Visser* 1944 CPD 30 at 37.

31 See, for example, *Fonda v Mutare Club* HH 40/1991.

32 *Muzengi v Standard Chartered Bank & Anor* 2002 (1) ZLR 334 (S); *Muzengi v Standard Chartered Bank & Anor* 2000 (2) ZLR 137 (H); *Bulawayo Municipality v Bulawayo Indian Sports Ground Committee* 1955 SR 114; 1956 (1) SA 34 (SR); *Kadada v City of Harare* HH 26/1994; *Lee Group of Companies v Ann Claire Elder* SC 6/2005; *Tafuma v Tudor House Consultants (Pvt) Ltd* 2002 (2) ZLR 1 (H).

33 *Jakazi & Anor v Church of Province of Central Africa & Ors* 2010 (1) ZLR 335 (H).

matic' or 'unilateral' theory of termination of contract, which says that a repudiatory breach going to the root of the contract automatically terminates the contract. Accordingly, a resignation without notice brings the employment contract to an end with no room for an employer to accept or reject it.³⁴

In English law, there is support for both the 'elective' and the 'automatic' theories and the highest courts there have been reluctant to settle the matter.³⁵ The better view of the law appears to be that there is no good reason to discard the elective theory of contract termination. To discard it would be to allow the contract-breaker to benefit from his or her own wrong.³⁶ In cases where the employee has not given the requisite notice, the resignation cannot have an automatic unilateral effect. The employer must retain an election of acceptance or rejection, subject to the fact that where specific performance is undesirable, the employer be deemed to have accepted the resignation. It is evident from *Thomas Meikles Stores v Mwaita & Anor*³⁷ that our courts favour the 'elective theory' of contract termination, even in employment contracts.³⁸

*Riva v National Social Security Authority*³⁹ illustrates the law on resignation. After disciplinary proceedings were instituted against him by the employer, Riva wrote a letter of resignation in the following terms:

I wish to give three months notice to terminate my employment with NSSA as per my contract.

The employer did not immediately reply. Ten days later, Riva wrote a second letter as follows:

I have not received confirmation... I accordingly retract my letter of notice to resign with immediate effect.

The employer wrote at the same time saying:

... on a purely without prejudice basis, the Authority has considered and agreed to allow you to terminate your services by resignation. The Authority accepts that your services be

34 See generally Deakin & Morris, pp. 363-66

35 See the discussions in Deakin & Morris, p. 367-69; Honeyball and Bowers, pp. 56-59.

36 Ibid.

37 2007 (2) ZLR 185 (S).

38 At p. 192F.

39 2002 (1) ZLR 412 (H).

terminated immediately and that you be paid in lieu of notice.

The employee claimed that his letter was not an act of resignation but an offer to resign, which could be accepted or rejected by the employer. The court held that the letter was not an offer to resign but a statement of resignation and, as such, was a unilateral act that required no acceptance or rejection. Accordingly, the purported withdrawal was ineffective without the consent of the employer. For the same reason, the letter by the employer ‘agreeing to allow’ the resignation was irrelevant.

In principle, the so-called ‘offer to resign’ only arises in matters of mutual termination of employment. In such matters, the offer to resign is an invitation to enter into a mutual agreement of termination. If the employer accepts the offer, the result is not a resignation but a mutual termination of employment.

*Fonda v Mutare Club*⁴⁰ took the form of ‘resign or be fired’. The employee had worked for the defendant for over 25 years. On his return from a seven-week leave he was presented with a report showing a shortfall in stocks of liquor over a period shortly before his leave. The employee offered to settle the shortfall. The offer was made by letter. He then received a letter from the employer, stating in part as follows:

This offer to accept payment from you is subject to you resigning forthwith from your employment... if you do not make payment in full and resign as aforesaid, the Club reserves the right to take whatever action which in the circumstances may seem appropriate...

At a meeting to discuss the matter after receiving the letter, the employee resigned verbally. The employee said he had not stolen anything and alleged that the resignation was due to pressure from the employer. He feared reference of the matter to the police. The employer’s attempts to have the employee confirm the resignation in writing failed. The court accepted the employee’s version of events and held that he had been constructively dismissed. It also found the dismissal unlawful. The court placed reliance on English law cases.⁴¹

A resignation is not always straightforward. It may be inferred from the facts. In *Lee Group of Companies v Ann Elder*,⁴² the employee had

40 H-H 40/1991.

41 See p. 9 of the cyclostyled judgment.

42 SC 6/2005.

been on a three-month probation. At the end of this, the employer expressed no dissatisfaction with her work and so she continued working. She made several requests for confirmation of her status as a permanent member of staff but received no positive response. After working for an additional seven months, she confronted one of the members of the management demanding confirmation of her permanent status. She was told that the employer was not happy with her performance and would therefore not make her a permanent staff member. Upset, she immediately packed her personal belongings and left the office without explaining where she was going and stayed away for three days. When she returned, she brought with her a doctor's report stating that she had been attended to on the day she left the office. Later that day, she brought a further letter from the doctor stating that she had been advised to go off duty for the three working days due to 'severe reactive depression'. The employer took the attitude that she had verbally tendered her resignation on the day she left the office. She denied this. The Supreme Court believed the employer's contention that the employee's abrupt vacation of office, three days' absence from work and the doctor's notes 'suspiciously obtained by her' led to the conclusion that she had resigned'.

Termination of probationary contract

Under the common law, there are two ways of terminating a probationary contract. The first is to allow the probation to run its full course and let it lapse automatically at the end of its duration. In this sense, a probationary contract is like any other contract of fixed duration.⁴³ The second is when termination takes place before the end of the probationary period. The common law allows an employer, dissatisfied with the capacity of a probationary employee, to terminate the contract on giving the requisite notice.⁴⁴ The notice period is that specified in the probationary contract. In the absence of a specified period of notice, a reasonable period is implied. However, the dissatisfaction of the employer must be *bona fide* and reasonable.⁴⁵ There must be evidence that the employer implemented assessments during the probationary period.⁴⁶ Where it is reasonable to do

43 *Kazembe v Adult Literacy Organisation* SC 173/1994; *Madawo v Interfresh Ltd* 2000 (1) ZLR 660 (H).

44 *SIRDC v Chakuparira* 2001 (2) ZLR 421 (S).

45 *Kwangwari v Commercial Bank of Zimbabwe Ltd* 2003 (1) ZLR 551 (H).

46 *Ibid.* See generally *SIRDC v Chakuparira*; *Madawo v Interfresh Ltd*.

so, the courts will insist on the employer providing the employee with an opportunity to improve before terminating the contract.⁴⁷

Termination of probationary contracts is governed by the common law, it being clear that the term ‘employee’ in section 12B does not cover a probationary employee.⁴⁸ In *Gumbo v Air Zimbabwe (Pvt) Ltd*⁴⁹ the probationary employee’s contract was terminated 26 days after the end of the probationary period. The employee argued that the delay in deciding whether or not to confirm the contract of employment was an implied confirmation. This was rejected by the court which insisted that on the facts, the contract was deemed to have terminated on the expiry of its duration. This position of the court was influenced by the fact that the employer’s dissatisfaction with the employee’s performance was evident on the papers and it never contemplated giving the employee a second chance.

Wrongful dismissal

This is a term used under the common law to refer to a dismissal that is in breach of the contract of employment. This term must be confined to an unlawful dismissal under the common law, and must be distinguished from ‘unfair dismissal’. The latter is a statutory concept that only arises under the relevant legislation, in this case the Labour Act. Therefore, an unlawful dismissal may be either a wrongful dismissal (under the common law) or an unfair dismissal (under the Labour Act) or any other dismissal contrary to law.

Termination Under Statute

The concept of unfair dismissal

The common law, as it still stands, has a major weakness in relation to termination of employment: it is largely not concerned with the fairness or unfairness of a termination. Its focus is on the lawfulness or otherwise of a termination. Yet, many terminations are unfair although they may be lawful.

The most far-reaching impact of the Labour Act on termination of employment is its introduction of the concept of unfair dismissal. This is

47 *Kwangwari v Commercial Bank of Zimbabwe Ltd* 2003(1) ZLR 551(H).

48 *Hammer and Tongues (Pvt) Ltd v Obadiah Giya* SC 54/2004

49 *Ibid.*

a recent development in Zimbabwe labour law, having being introduced in 2002.⁵⁰ Before 2002, the Act still protected employees against arbitrary dismissal through a legal regime that abolished termination under the common law and required termination of employment either to be sanctioned by a quasi-judicial Government official or to be in terms of a registered code of conduct. In cases not involving misconduct, approval by the Minister of Labour was required for a termination to be lawful. However, the scope of protection against dismissal was narrower than the concept of unfair dismissal.

The concept of unfair dismissal is contained in section 12B of the Labour Act, which provides as follows:

- (1) Every employee has the right not to be unfairly dismissed.
- (2) An employee is unfairly dismissed:
 - (a) if, subject to subsection (3), the employer fails to show that he dismissed the employee in terms of an employment code; or
 - (b) in the absence of an employment code, the employer shall comply with the model code made in terms of section 101(9).
- (3) An employee is deemed to have been unfairly dismissed:
 - (a) if the employee terminated the contract of employment with or without notice because the employer deliberately made continued employment intolerable for the employee;
 - (b) if, on termination of an employment contract of fixed duration, the employee:
 - (i) had a legitimate expectation of being re-engaged; and
 - (ii) another person was engaged instead of the employee.

The Act does not define unfair dismissal. It has two types of unfair dismissals: automatically unfair dismissals specified in section 12B(2) and 12B(3), and generic unfair dismissals under section 12B(1). The scheme of the Act regarding unfair dismissals involves three questions:

⁵⁰ Act No. 17 of 2002.

- (a) Does section 12B apply? If it does not apply, there is no further enquiry except to apply some other provisions of the Act or other statute or the common law. If it applies, the second question arises.
- (b) Is the dismissal automatically unfair in terms of section 12B(2) or 12B(3)? If it is, that is the end of the matter; there is an unfair dismissal. If it is not automatically unfair, the third question must be answered.
- (c) Is the dismissal otherwise generically unfair under section 12B(1)?

These three questions will now be addressed.

Does section 12B apply?

Section 12B does not apply to every termination of employment. It does not apply where the Act, in other provisions, is specific about termination. This is the case with retrenchment, which is specifically provided for in sections 12C and 12D. Sections 12C and 12D are not made subject to section 12B so that where the retrenchment process is in full compliance with section 12C and 12D, *cadit quaestio*: the termination is unassailable at law and cannot be challenged on any other ground under the Act.

Secondly, section 12B does not apply to the termination of employment of probationary employees, apprentices or trainees, as these are governed by the common law. This is because it is neither sensible nor logical to apply the concept of unfair dismissal to persons who are still being assessed to determine whether or not they become employees. In other words, the term ‘employee’ in section 12B must be interpreted as excluding probationary employees, apprentices and trainees. These remain ‘employees’ for other purposes of the Act but not for section 12B. As already noted, the common law incorporates some component of fairness in terminating these contracts by requiring assessments and warnings.⁵¹

Thirdly, section 12B does not apply to the dismissal of strikers via a disposal order issued by the Labour Court in terms of section 107 of the Act.⁵²

If section 12B applies, is the dismissal automatically unfair?

⁵¹ See p. 98.

⁵² See Chapter 14.

There are four circumstances specified in section 12B in which a dismissal is automatically unfair:

- If there is a registered code of conduct and the dismissal for misconduct is not in terms of that code.⁵³
- If, in the absence of a registered code of conduct, the dismissal for misconduct is not in terms of the model code made in terms of section 101(9) of the Act.⁵⁴
- Constructive dismissal arising from an employee terminating the contract of employment because of the employer's conduct.⁵⁵
- Constructive dismissal arising from the non-renewal of a fixed-term contract.⁵⁶

If a dismissal is automatically unfair, the employee is regarded as having been unfairly dismissed. The termination of employment is thereby unlawful. In all the four circumstances of automatically unfair dismissals, the onus is on the employee to prove that the circumstances fall within the scope of the relevant provisions of the Act.

The first two circumstances of automatically unfair dismissals will be covered in detail in the next two chapters. The two other forms of constructive dismissal are discussed here.

1. Termination by employee due to employer's conduct

Constructive dismissal in section 12B(3)(a) is automatically unfair if the employee terminated the contract with or without notice because:

- (i) continued employment was intolerable, and
- (ii) the intolerability was deliberately caused by the employer.

This is narrower than constructive dismissal under the common law because of the requirement that the conduct of the employer be 'deliberate'. The test for whether or not continued employment was intolerable is an objective one: would a reasonable employee have found continued employment intolerable? There must be a causal nexus between the resignation of the employee and the intolerable situation. It appears that

⁵³ Section 12B(2)(a).

⁵⁴ Section 12B(2)(b).

⁵⁵ Section 12B(3)(a).

⁵⁶ Section 12B(3)(b).

the intolerable situation must be the sole cause of the resignation for the constructive dismissal to be automatically unfair under section 12B(3)(a). Finally, the employer's conduct must have been 'deliberate'. This means that the employer must have intended to cause the resignation of the employee. Thus, where the employer is genuine, but mistaken, about certain contractual terms with the employee, this cannot be said to be 'deliberate'.

The intolerable situation must be caused by the 'employer'. In many cases, the conduct complained of is caused by the employee's immediate supervisor. Whether or not the supervisor is the 'employer' for purposes of section 12B(3)(a) is determined by the same test used for vicarious liability, namely whether the supervisor was acting in the course of employment.⁵⁷

An employee who resigns cannot assert an unfair dismissal except in terms of the doctrine of constructive dismissal in section 12 B(3)(a).⁵⁸ In *Thomas Meikles Stores v Mwaita & Anor*⁵⁹ the employer wrote to the two employees and informed them that, due to the economic downturn, it had been forced to restructure and gave them the choice of accepting a demotion or opting for exit packages. This effectively forced the employees to cancel their contracts as they could not accept the humiliation of a demotion. This was held to be constructive dismissal.

2. Non-renewal of a fixed-term contract

Constructive dismissal in section 12B(3)(b) is automatically unfair if a fixed-term contract is not renewed where the employee (i) had a legitimate expectation of being re-engaged and (ii) another person was engaged instead of the employee. Both requirements must be satisfied for the constructive dismissal to be automatically unfair. The onus is on the employee to prove the two requirements.⁶⁰

The test for a legitimate expectation is objective: would a reasonable person expect re-engagement? This requires an assessment of all the circumstances of the case. To be 'legitimate', the expectation must arise from impressions created by the employer. It seems trite that there are

⁵⁷ See *Hilton International Hotels (UK) Ltd v Protopapa* [1990] IRLR 316.

⁵⁸ *Mushonga v National Railways of Zimbabwe* 1986 (1) ZLR 111 (HC).

⁵⁹ 2007 (2) ZLR 185 (S).

⁶⁰ *UZ-UCSF Collaborative Research Programme in Women's Health v Shumuyarira* 2010 (1) ZLR 127 (S).

two main ways in which the employer may create the expectation: prior promise or regular (or past) practice. In the English case of *Council of Civil Service Unions v Minister of the Civil Service*⁶¹ it was said:

*... legitimate or reasonable expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue.*⁶²

Regular practice of renewals creates a legitimate expectation of re-engagement.

In *UZ-UCSF Collaborative Research Programme in Women's Health v Shamuyarira*⁶³ the employee had signed a letter of renewal in which the parties had agreed that the renewal would not give rise to a legitimate expectation for a further renewal. The Supreme Court held that in such a situation, the employee cannot possibly entertain a legitimate expectation of re-engagement. This was followed in *Kundai Magodora & Ors v Care International Zimbabwe*⁶⁴ where the employees had signed a contract with the following clause:

This contract shall in no way whatsoever lead to a legitimate expectation of further employment beyond the contract's date of termination.

Patel JA held that the employees were bound by the express terms that they had agreed to and could not have had a legitimate expectation of being re-engaged. He said it was not open to the courts to rewrite a contract for the parties, even where the consequences of the contract were onerous or oppressive. It is submitted that this is too narrow an interpretation of section 12B(3)(b). Depending on the circumstances, it is possible to have a legitimate expectation of re-engagement even where the contract has express provisions for the employee not to have such expectations. This may be so if there is evidence of previous renewals notwithstanding such contractual provisions. Indeed, the South African

61 [1984] 3 All ER 935 at 944.

62 See also *Administrator, Transvaal v Traub* 1989 (4) SA 731 (A) at 756.

63 2010 (1) ZLR 127 (S).

64 SC 24/2014.

courts have taken this attitude.⁶⁵ The approach in the *Shamuyarira* and *Kundai Magodora* cases (*supra*) is wrong. Unfair dismissal is largely about interfering with both the freedom and sanctity of contracts. Taking away legitimate expectation merely by the insertion of contractual clauses defeats the very reason for the Legislature's resort to the concept of legitimate expectation.

A clear example of where it is difficult to prove legitimate expectation of re-engagement is where employment is dependent on funding (typically in NGOs) and the employee is aware of inadequate or unavailable funding.

The second requirement of 'another person' being 'engaged instead of the employee' has been held to mean that the other person must be engaged to do the employee's actual work and not in a different capacity.⁶⁶ A better view is that the requirement is satisfied even where the other person has been engaged to do substantially similar work or work that could have been done by the employee.

'Another person' is not restricted to be a new person being engaged. It also covers a person who is already employed and whose duties are substantially changed to take over the work of the employee. For example, if an existing employee is 'promoted' to take over the work of the employee, there is 'another person' for the purposes of section 12B(3)(b).

If the dismissal is not automatically unfair, is it otherwise unfair in terms of section 12B(1)?

Although the concept of unfair dismissal is not defined, it is submitted that its meaning is well-established. The intention of the Legislature was to import the meaning of unfair dismissal enshrined in international labour law. This is because, in recent times, virtually every country incorporating unfair dismissal has imported the concept from international labour law, the source of the concept of unfair dismissal being the Termination of Employment Convention 158 of 1982. Unfair dismissal under the Convention has two dimensions: the employer must have a fair reason to terminate employment (substantive fairness), and in terminating employment the employer must follow fair pre-dismissal procedures (procedural fairness).

65 *SA Rugby (Pty) Ltd v CCMA & Ors* [2006] BLLR 27 (LC); *SA Rugby (Pty) Ltd v CCMA & Ors* [2008] 9 BLLR 845 (LAC); *SACTWU v Cadema Industries (Pty) Ltd* 2008 8 BLLR 790 (LC).

66 *UZ-UCSF Collaborative Research Programme in Women's Health v Shamuyarira* 2010 (1) ZLR 127 (S) at 131 A-C.

A fair dismissal must be both substantively and procedurally fair.

Substantive fairness has two components. The first is that there must be a reason for the dismissal. If there is no reason at all, the dismissal is on that score alone unfair. Where the reason given is not genuine, there is no reason at all. This is so in cases where the employer dismisses for no reason but hunts around for a reason to justify it. The reason must exist at the time of the dismissal. The onus is on the employer to prove a reason for the dismissal. The second aspect of substantive fairness only arises after a reason has been established; it is to ask and answer the following question: was it reasonable to dismiss for that reason? For substantive fairness, this question must be answered in the affirmative. If not, the dismissal is unfair. A finding of whether or not it was reasonable to dismiss for the reason given is a finding of fact.

Procedural fairness requires, at its centre, respect for the principle of natural justice. The employee, prior to the dismissal, must be afforded an opportunity to request the employer's reasons for the dismissal and if he or she so wishes to challenge it.

It now remains to set out the circumstances in which section 12B(1) may arise.

The first circumstance is of matters not covered by either a registered code of conduct or the model code. By definition, an employment code of conduct only covers matters of misconduct. If a dismissal does not involve misconduct, it cannot be dealt with in terms of a code of conduct.⁶⁷ In the absence of a registered code of conduct, dismissal must be in accordance with the model code. However, the model code does not cover every dismissal 'in the absence' of a registered code of conduct. The model code only deals with dismissals for a misconduct specified in its section 4.

If a matter is not a dismissal for a misconduct specified in its section 4, it is not governed by the model code. Three key situations have to comply directly with section 12B(1): dismissal for health reasons under section 14 of the Act; termination pursuant to a retrenchment of less than five employees outside section 12C of the Act; and termination on notice where the employee is not accused of any misconduct and is not a retrenchee, but the employer merely wishes to terminate employment.

⁶⁷ *Chirasasa & Ors v Nhamo NO & Anor* 2003 (2) ZLR 206 (S).

Dismissal for health reasons

Section 14 of the Act permits an employer to terminate the employment of an employee who has exhausted the sick leave prescribed in the Act or in the contract of employment if this is more favourable. This termination must be fair and must comply with section 12B(1).⁶⁸ In prescribing a maximum period of sick leave and permitting the employer to terminate employment after the exhaustion of that period, the Act is addressing the substantive fairness to a large extent. The questions to ask and answer are: Is the employer reasonably expected to wait any longer? If so, how much longer? If the employer is not reasonably expected to wait any longer, dismissal is fair. In answering these questions, procedural fairness comes into play. The employer must make informed decisions based on proper medical information and the employee must be consulted and his or her views fully considered.⁶⁹

In *Zimasco (Pvt) Ltd v Maynard Marikano*⁷⁰ it was argued that section 14(4) gives the employer an absolute right to elect to terminate the employment of the employee who has exhausted the maximum sick leave period specified in the Act. It was further argued that the right to terminate is not subject to compliance with any particular procedures. This was rejected by the Supreme Court. Garwe JA said:

Since the decision to terminate an employment contract has far reaching consequences, one should assume that before such a decision is taken the employer would be obliged, at the very least, to advise the employee of the fact that he has taken the sick leave contemplated in s14(4) and that for that reason it is intended to terminate his contract of employment in terms of that section on a date specified in such notice unless the employee returns to work before the expiration of the specified period. In my view it would not be proper for an employer to invoke the provisions of s14(4) of the Act and, without notice to the employee, proceed to terminate his contract of employment. In short, the audi alteram principle would still need to be respected and failure to do so would render any such termination null and void.⁷¹

68 See generally *Mutukwa v National Dairy Co-operative Ltd* 1996 (1) ZLR 341 (S).

69 See *Hooper v British Railway Board* [1988] IRLR 517; *East Lindsey District Council v Daubney* 1977 ICR 566, [1977] IRLR.

70 SC 6/2014.

71 At p. 8.

Retrenchment of less than five employees

Section 12C applies to a retrenchment of five or more employees. As already noted, section 12C is not subject to section 12B. The retrenchment of less than five employees, being outside section 12C, is subject to the unfair dismissal regime of section 12B. The retrenchment of less than five employees is governed by SI 186/2003, which is, in principle, subject to section 12B(1). However, it is submitted that it complies with fair dismissal principles and therefore adherence to its provisions will not offend against section 12B(1). This mainly arises from the fact that it provides for substantially the same processes as in section 12C.

Termination on notice

The unfair dismissal provisions in section 12B(1) mean that the common law dismissal on notice is absolutely outlawed for employment relationships covered by the Labour Act, except for the cases of probationary employees, apprentices and trainees. Termination on notice is inconsistent with any notice of fair dismissal. If the employer wishes to terminate employment in a case not involving misconduct, and which is not a retrenchment, it cannot be done merely by giving notice. The employer must have a reason that makes dismissal reasonable on notice, and must give the employee an opportunity to be heard. If notice is thereafter served on the employee, it is not impossible to satisfy the requirements of a fair dismissal. The major change made by statutory unfair dismissal to the common law is that an employer can no longer rely on the principle that the *audi alteram partem* rule only limits the exercise of the contractual right to dismiss on notice where it is part of the contract.⁷² An example of a good reason that may sustain a fair dismissal on notice provided the employer observes the *audi alteram partem* rule is in *Chirasasa & Ors v Nhamo NO & Anor*.⁷³ In that case, the three employees refused to accept new conditions of service that the employer wished to introduce in order to enhance production. A majority of their colleagues had accepted the new conditions: out of 12 affected managers, nine accepted. These changes had been recommended by a job evaluation exercise that noted that a branch manager's job had been wrongly graded and overvalued. The new changes included a movement away from fixed

⁷² *Chirasasa & Ors v Nhamo NO & Anor* 2003 (2) ZLR 206 (S).

⁷³ *Ibid.*

salaries to performance-related remuneration based on production targets. There was no act of misconduct in refusing the new conditions. This was also not a retrenchment. The employees were dismissed on one month's notice. This was held lawful in the pre-unfair dismissal era but it may still pass a fair dismissal test if the employees are given an opportunity to be heard before the termination. This is what Malaba JA said:

They had been offered employment under the new terms and conditions which they did not accept. The other branch managers had appreciated the fact that the proposed changes in their conditions of employment were in the interests of the business and accepted them. The appellants failed to appreciate that a contract of employment cannot remain static throughout the whole of its existence regardless of the changes in the fortunes of the business. Refusal to accept a change in the terms and conditions of employment necessitated by the commercial interests of a business may be a good reason for terminating a contract of employment on notice.⁷⁴

Section 12(4) provides as follows:

12(4) Except where a longer period of notice has been provided for under a contract of employment or in any relevant enactment, and subject to subsections (5), (6) and (7), notice of termination of the contract of employment to be given by either party shall be:

- (a) three months in the case of a contract without limit of time or a contract for a period of two years or more;
- (b) two months in the case of a contract for a period of one year or more but less than two years;
- (c) one month in the case of a contract for a period of six months or more but less than one year;
- (d) two weeks in the case of a contract for a period of three months or more but less than six months;
- (e) one day in the case of a contract for a period of less than three months or in the case of casual work or seasonal work.

74 At 220B-C.

These provisions do not give an employer the right to dismiss on notice. Even before the 'unfair dismissal' provisions of the Labour Act, the courts had consistently held that the mere existence of provisions such as section 12(4) did not mean a dismissal on notice. The leading case is *Art Corporation Ltd v Moyana*,⁷⁵ in which it was held that the only effect of a provision such as Section 12(4) is to insert a minimum notice period in a contract of employment. The use of that notice period is subject to other provisions of the law. McNally JA had this to say concerning the predecessor to section 12(4):⁷⁶

*This section does not enshrine the right of an employer to terminate a contract on notice. All it does is to introduce a statutory term into employment contracts ... I am entirely satisfied that the section is no more than a deeming section. It speaks only of the content of a contract of employment; it says nothing about the enforceability of the terms deemed to be part of the contract.*⁷⁷

On this basis, the Supreme Court firmly rejected the argument that the provisions of SI 371/1985, which abolished dismissal on notice, were *ultra vires* the Act. However, with an underlying inarticulate premise to revive termination on notice, some judges exploited loopholes in the law on registered codes of conduct. Section 1A of SI 371/1985, inserted by SI 377/1990, removed the application of SI 371/1985 to employees to whom the provisions of a registered code of conduct applied. The question was whether or not this provision meant that even in matters not covered by the code, such as matters not involving misconduct, the employer was not required to follow the provisions of SI 371/1985 and could dismiss on notice or even summarily. In *Masundire v Willowvale Mazda Motor Industries*⁷⁸ Bartlett J held that a literal interpretation of section 1A of 371/1985, which gave the right to dismiss on notice merely by registering a code covering cases of misconduct, was so absurd that it could never have been intended. Gubbay CJ disagreed, in *Chivinge v Mushayakarara*, where he remarked that there was no absurdity as the

75 1989 (1) ZLR 304 (S).

76 It was section 12(1) of the Labour Relations Act, 1985.

77 At p. 309. See also *Commercial Careers College (1980) (Pvt) Ltd v Jarvis* 1989 (1) ZLR 344 (S); *Chivinge v Mushayakarara* 1998 (2) ZLR 500 at 503E.

78 Cited in *Chivinge v Mushayakarara & Anor* 1998 ZLR 500 (S).

Legislature may be taken to have decided to give up all other protections once the parties decided to regulate themselves in cases of misconduct. This *obiter dictum* was taken as the law by Garwe J in *Samuriwo v ZUPCO*.⁷⁹ On appeal in *Samuriwo v ZUPCO*⁸⁰ the Supreme Court did not decide the point as it held that section 1A did not arise because the managing director was not covered by the code of conduct. Accordingly Ministerial permission was required to terminate his contract of employment. The issue had to be faced again in *Getrude Kwaramba v Bain Industries (Pvt) Ltd*,⁸¹ where Gwaunza J also followed the *obiter* in *Chivinge v Mushayakarara*. The Supreme Court finally settled the matter on appeal in *Getrude Kwaramba v Bain Industries*⁸² where Sandura JA, after referring to the dictum in *Chivinge v Mushayakarara*, stated:

*As the appellant was an employee to whom the provisions of an employment code of conduct ... applied, cadit quaestio. That is the end of the matter. It was not, therefore, necessary for the respondent to seek the Minister's authority to terminate the appellant's contract of employment.*⁸³

This position was further affirmed in *Chirasasa & Ors v Nhamo NO & Anor*.⁸⁴ That Chirasasa was confined to section 1A of SI 371/1985 was confirmed in *PG Industries (Pvt) Ltd v Nkululeko Mabhena*⁸⁵ where dismissal on notice was declared invalid on the basis that, since the employer was alleging misconduct, it had to follow procedures in the code of conduct. *Chirasasa* was followed in *Colcom Foods Limited v Christopher Kabasa*.⁸⁶ Mr Kabasa was employed as a human resources manager. He was allowed to sit as a member of the board of directors of Colcom. The privilege of sitting on the board was later withdrawn, with the effect that Kabasa remained a human resources manager with no loss of salary and benefits. Kabasa did not accept the withdrawal of the status of a director, arguing that it constituted a demotion to the position of human resources manager. He was given three months notice and the contract

79 1999 (1) ZLR 385 (H).

80 2000 (1) ZLR 647 (S).

81 HH 150/2000.

82 SC 39/2001.

83 See p. 5.

84 2003 (2) ZLR 206 (S).

85 SC 44/2003.

86 SC 12/2004.

was terminated. As there was an applicable code of conduct, the Supreme Court held that section 1A of SI 371/1985 applied and termination on notice was permissible. The positions of being director of the company and an employee at the same time were separate. The former was under company law.

This line of cases is no longer of any use following the repeal of SI 371/1985 and the enactment of section 12B.

As the law currently stands, the notice periods in section 12(4) have the effect of binding an employee who wishes to resign: he or she must give the minimum notice period in section 12(4), or a longer period if provided for in his or her contract of employment. In the case of employers, they will have effect for a dismissal on notice if the requirements for fairness, as discussed above, are met, otherwise they mainly have effect in matters not governed by unfair dismissal provisions in section 12B, such as retrenchment and probationary contracts. In retrenchment, for example, it is provided in section 12C(5) as follows:

No employer shall retrench any employee without affording the employee the notice of termination to which the employee is entitled.

This means that once a retrenchment has been approved, the employee must be given notice, and section 12(4) will come into play in determining the length of the notice period.

In matters governed by unfair dismissal provisions, the minimum length of notice provided for in section 12(4) may be one of the factors to be taken into account in determining the fairness of the dismissal.

Other dismissals covered by section 12 B (1)

The second circumstance is of dismissals that are not automatically unfair by virtue of having been done in compliance with section 12B(2). These are dismissals in compliance with either a registered code of conduct or the model code. Such dismissals may still be unfair notwithstanding compliance with the relevant code. If the provisions of the code fail the fairness test (whether substantive or procedural or both) there is room to invoke section 12B(1). This is because the Act does not say that compliance with the code is automatically fair. It says that non-compliance with the code is automatically unfair, thus leaving the issue of compliance with the code subject to the fairness test. Further, and more

fundamentally, the Act cannot be read to have surrendered the concept of fairness to the codes, whatever their content.

The third situation is where a constructive dismissal has failed to satisfy the stringent requirements for automatically unfair dismissals under section 12B(3). Such a dismissal may still be unfair under section 12B(1). Section 12B(3) does not exhaust instances of unfairness; its purpose is merely to specify those cases which qualify, as automatically unfair. For example, the conduct of the employer, while serious, may not be ‘deliberate’ for the purposes of section 12B(3)(a), but may be clearly unfair under section 12B(1). Similarly, an employee with a legitimate expectation of being re-engaged may fail to prove that another person was engaged as required by section 12B(3)(b) but the dismissal may nonetheless be unfair under section 12B(1).

Terminal benefits

The failure of an employer to pay terminal benefits does not mean that the contract of employment subsists until the benefits are paid.⁸⁷ The right given by section 13 to an employee, at the conclusion of a contract of employment, to receive his or her pay and benefits does not override the employer’s right to set off any liquidated debts owing to the employer by the employee.⁸⁸ This is usually the case where the employee has a loan from the employer which is not yet repaid in full at the time of termination of employment. The employer is entitled to withhold a liquidated amount in wages or benefits in order to set off liquidated debts due by the employee.

Terminal benefits are largely a matter of contract. The Labour Act only provides for the following terminal benefits and these must be paid whenever employment is terminated, regardless of the reason for or cause of the termination,⁸⁹ be it dismissal for misconduct or resignation or death or incapacity:

- wages and benefits up to the time of termination;
- outstanding vacation leave;

87 See *obiter* statement in *Shadreck Moyo & Ors v JL Hoffman & Anor* SC 26/2013.

88 *Ndebele v International Crops Research Institute for Semi-Arid Tropics* 2002 (1) ZLR 666 (H).

89 Section 13(1).

- payment in lieu of notice (where applicable);
- outstanding medical aid;
- any pension (where applicable).

A gratuity is not one of the terminal benefits available under the Labour Act. To get a gratuity as a terminal benefit, it must be provided for in the contract of employment or applicable collective bargaining agreement. Most collective bargaining agreements provide for the payment of a gratuity as a terminal benefit. For example, the collective bargaining agreement in the insurance industry provides:

‘... an employee who has completed five or more years of continuous service shall, on the termination of such service, irrespective of the circumstances of such termination, be paid a gratuity of not less than the amount derived by multiplying the appropriate percentage of his current monthly wage by the number of completed years of continuous service, as set out in the Third Schedule’.

This is the standard provision in most collective bargaining agreements.

The law provides a special set of terminal benefits for employees affected by compulsory acquisition of land. This is mainly for farm workers but the definition of ‘employee’ is wide enough to cover every person employed by, or working for, an employer in the agricultural industry. These benefits are payable where the termination has become necessary because of compulsory acquisition of any farm or part of a farm belonging to the employer. The terminal benefits include: (i) severance pay equivalent to three months wages, (ii) wages in lieu of notice, (iii) an amount equivalent to twice the employee’s current monthly wage for each completed year of continuous service, (iv) one month salary as relocation allowance, (v) a gratuity and (vi) the cash equivalent of any vacation leave accumulated in the year of termination of employment. The employer is obliged to pay these benefits even where termination is done before the completion of all formalities for the acquisition of the farm.

TERMINATION OF EMPLOYMENT

(II) TERMINATION UNDER THE MODEL CODE

Introduction

It has already been noted that in terms of section 12B(2) of the Labour Act, it is an automatically unfair dismissal if, 'in the absence of an employment code', an employer fails to comply with the Model Code made in terms of section 101(9). In the absence of an employment code, compliance with the Model Code is therefore mandatory in all cases involving misconduct to avoid a dismissal being characterized as automatically unfair. However, it must be borne in mind that there are exceptional cases where compliance with the Model Code may not be sufficient to make a dismissal fair.

This chapter reviews the law of termination of employment in terms of the Model Code.

What is the Model Code?

Section 101(9) provides as follows:

The Minister may, after consultation with representatives of trade unions and employers' organizations, by statutory instrument publish a Model Code of conduct.

There are two functions of a Model Code made and published in terms of section 101(9). The first is in section 101(10). An employment council or works council may make an application to the Registrar to be allowed to adopt the Model Code subject to any modifications which may

be appropriate to the industry, undertaking or workplace concerned. If the application is granted, the Model Code (with modifications, if any) shall become the employment code for the employment council or works council concerned.

The second function of the Model Code is in section 12B(2). It must be complied with by every employer 'in the absence of an employment code' to avoid an automatically unfair dismissal.

The Minister made and published the Model Code in January 2006. The National Employment Code of Conduct was published as a component of SI 15/2006. Apart from providing for the Model Code, this has substantive provisions on termination of employment in two other situations: termination by mutual agreement and termination of contracts of fixed duration. It is therefore inaccurate to refer to SI 15/2006 as the Model Code. SI 15/2006 provides for the Model Code, so a better formulation is: 'the Model Code provided for in SI 15/2006'.

Before discussing termination under the Model Code, it is necessary to dispose of two other terminations.

Mutual agreement in writing between employer and employee under 5(b) of SI 15/2006

The agreement between the parties must be real and must be in writing. It was held in *Choga v Johnston's Motor Transport (Pvt) Ltd*¹ that an agreement which is not in writing is a nullity. In *Ruturi v Heritage Clothing (Pvt) Ltd*,² it was held that the phrase 'mutually agree in writing' requires that the written agreement be signed by both employer and employee. In the words of Gubbay CJ:

*In the context, the use of the word 'mutually' is significant. It underlies the requirement that the assent of the parties to the termination of employment must appear ex facie the document. Put otherwise, that without need to go beyond or outside the document, the existence of an agreement to terminate is reflected. The document must stand on its own feet. It must constitute the sole permissible evidence of termination.*³

In that case, the general manager wrote to the employee, advising him

1 1998 (2) ZLR 560 (H).

2 1994 (2) ZLR 374 (S).

3 At p. 379F.

that the company had decided to terminate his contract of employment. The employee was told to leave the company's premises and to return to collect his terminal benefits later. After subsequently collecting his terminal benefits, the employee brought an action for unlawful dismissal. The employer argued that, in collecting his terminal benefits, the employee had by implication agreed to termination of employment in terms of the regulations. This was rejected by the Supreme Court on the basis that there was no mutual agreement.

An employee who signs a document meant to be for mutual termination of employment without a genuine intention to do so but to get terminal benefits cannot turn around to disown the document.⁴

'Mutual' has been taken to suggest a meeting of minds or commonality of purpose.⁵ There is no meeting of the minds and therefore no mutual termination where an employee's signature on a letter or document is either conditional or open to other interpretations. In *Clarke Engineering Transport v Regis H. Chikozho*⁶ the employer notified the employee, who had been ill for some time, that it could not continue employing him and wished to place him on early retirement. This notification was by a letter addressed to the employee. Three signatures were appended to the letter: the employee, the employer's representative and a witness. About three days later, the employee received the benefits outlined in the letter. Subsequently, the employer filed with NSSA a claim for an invalidity pension. NSSA rejected the claim for an invalidity pension when a medical doctor issued a 'Medical Report Certificate' indicating that the employee was fit and capable of continuing with his work. The employee sought to return to work but the employer refused, contending that there had been a mutual termination. The court held that the employee's signature at the bottom of the letter addressed to him was not a consent to termination of employment. It could have been an acknowledgement of receipt of the letter. It could also have been conditional on being successfully placed on early retirement on the grounds of ill-health. As early retirement on medical grounds was unsuccessful, there was no mutual retirement.

What of termination via a 'buy-out' clause? Such a clause is one where the employer is given the power to terminate the contract at will for any

4 *Gauntlet Security Services (Pvt) Ltd v Las Hlabangani* SC 51/2004.

5 *Per Gwaunza JA in Clarke Engineering Transport v Regis H Chikozho* SC 104/2004.

6 SC 104/2004.

reason whatsoever other than the breach of contract by the employee provided the employer pays the employee a specified sum of money. An example of a 'buy-out' clause was in *Industrial Steel & Pipe Ltd v Moodie*⁷ where clause 8 of the employment contract read:

In the event of the employee's contract being terminated by the company for any reason whatsoever, other than in terms of clause seven (7) of this Agreement, the employee shall be paid compensation equal to a minimum of two (2) years of emoluments including all benefits as specified in Annexure A.

Clause (7) dealt with termination for breach of contract by the employee.

The Supreme Court held this clause to be valid on the basis that it was not a penalty or pre-estimated damages because it did not come into operation upon breach of contract. The question is: does a 'buy-out' clause survive the unfair dismissal prohibition in section 12B(1) of the Act? The answer is that each 'buy-out' clause must be considered on its own merits. Where the compensation payable to the employee is fair and reasonable, the termination pursuant to a 'buy-out' clause is not an unfair dismissal within the contemplation of section 12B(1). It would be termination by mutual consent, the consent having given in advance. On the other hand, if the compensation payable is unfair or unreasonable, termination pursuant to the clause is an unfair dismissal for absence of genuine mutual consent.

Engagement for a period of fixed duration

The regulations merely confirm the common law position already discussed, namely that a contract of fixed duration lapses automatically at the end of its duration. This is subject to the law on constructive dismissal in section 12B(3) which has been discussed in Chapter 5.

Does the Model Code apply?

As with registered codes of conduct, the Model Code only covers dismissals arising from misconduct. The Model Code applies 'in the absence' of a registered code of conduct. The expression 'in the absence of' must be interpreted purposively: the mere existence of a registered code of conduct is not sufficient to oust resort to the Model Code. There

⁷ 1997 (1) ZLR 617 (S).

must be in existence a registered code of conduct applicable to the case in question. Where there is a registered code which is inapplicable to the circumstances of the case, there is ‘the absence of an employment code’ for purposes of section 12B(2) of the Labour Act. In *Samuriwo v Zimbabwe United Passenger Co. Ltd*⁸ there existed a registered code that applied to ‘all employees regardless of rank’. The case involved a managing director. The Supreme Court held that the code was not applicable to the managing director whose dismissal had to be in terms of the predecessor to S II 5/2006.⁹

The expression ‘in the absence of an employment code’ also covers situations where the code is rendered inapplicable by circumstances which make it impracticable to apply the code. The leading case for this proposition is *Cargo Carriers (Pvt) Ltd v Zambezi & Ors.*¹⁰ In that case, the provisions of the code were overwhelmed by the number of employees facing disciplinary proceedings after a strike. In holding the code inapplicable, Gubbay CJ said:

*In sum, there was no realistic way in which the appellant could convene a form of mass trial of the 322 employees and stay within the parameters of the code of conduct.*¹¹

Similarly, if a registered code of conduct does not provide for some of the serious acts of misconduct covered by the Model Code, an employer is entitled to resort to the Model Code in respect of those acts not covered by its registered code of conduct.¹² In other words, if a registered employment code has no provision for a serious act of misconduct specified in the Model Code, there is an ‘absence of an employment code’ for the purposes of section 12B(2) of the Labour Act.

There are employees who, apart from the Labour Act, are also governed by other statutes that provide specific disciplinary rules and procedures. The disciplinary rules and procedures so provided are not ‘an

8 2000 (1) ZLR 647 (S).

9 SI 371/85.

10 1996 (1) ZLR 613 (S).

11 At 619H.

12 *Zimpost (Pvt) Ltd v Communications and Allied Workers’ Union* 2009 (1) ZLR 334 (S); *Net-One Cellular (Pvt) Ltd v Communications & Allied Services Workers’ Union of Zimbabwe* SC 89/2005.

employment code' and therefore the Model Code must apply.¹³

If there is in existence a registered and applicable employment code, resorting to the Model Code renders the termination unlawful.¹⁴

Disciplinary procedure under the Model Code

The disciplinary procedure under the Model Code only applies if an employee is suspected of having committed a serious misconduct specified in the code.¹⁵

Further, there is no room for summary dismissal, however serious the misconduct. Every employee suspected of serious misconduct must be subjected to a disciplinary process. Summary suspension is the furthest an employer can go before a disciplinary process is put in motion.

The acts of misconduct are specified in section 4:

(4) *Misconduct*

An employee commits a serious misconduct if he or she commits any of the following offences –

- (a) any act of conduct or omission inconsistent with the fulfilment of the express or implied conditions of his or her contract; or
- (b) wilful disobedience to a lawful order; or
- (c) wilful and unlawful destruction of the employer's property; or
- (d) theft or fraud; or
- (e) absence from work for a period of five or more working days without leave or reasonable cause in a year; or
- (f) gross incompetency or inefficiency in the performance of his or her work; or
- (g) habitual and substantial neglect of his or her duties, or
- (h) lack of a skill which the employee expressly or impliedly held himself or herself to possess.

An employer who has 'good cause' to believe that an employee has committed one or more acts of misconduct specified in section 4 may

¹³ See *Tendayi Tamanikwa & Ors v Zimbabwe Manpower Development Fund* SC 33/2013; *Augustine M. Tirivangani v University of Zimbabwe* SC 21/2013.

¹⁴ *Chikomba Rural District Council v Pasipanodya* 2012 (1) ZLR 577 (S).

¹⁵ Section 6.

suspend such employee with or without pay.¹⁶ ‘Good cause’ in this case merely means ‘reasonable suspicion’.

After suspension, the employer must ‘forthwith’ serve the employee with a letter of suspension with reasons and grounds of suspension. Upon serving the employee with this suspension letter, the employer shall, within 14 working days, investigate the matter and conduct a hearing into the alleged misconduct and serve a notice, in writing, on the employee either terminating the contract of employment or removing the suspension.¹⁷

At a hearing into the alleged misconduct the employee is entitled to a bundle of rights,¹⁸ including (i) being given at least three working days notice of the proceedings and the charge, (ii) representation by a legal practitioner or fellow employee or workers’ committee member or trade union official, (iii) the right to call witnesses and to cross-examine witnesses giving evidence against him or her, (iv) being informed of reasons for the decision made against him or her, and (v) addressing in mitigation before the penalty of dismissal is imposed.

A number of legal issues arise. The 14 working days begin ‘upon serving the employee with the suspension letter’ and not before. The suspension of the employee and serving the employee with a letter of suspension are two distinct acts. The employer need not separate the two acts and may serve the letter of suspension with reasons and grounds at the time of the suspension. Where the two acts are separate, the serving of the letter of suspension with reasons and grounds must be done ‘forthwith’.

Under the old SI 371/85, an employer, after suspending the employee, was required to apply ‘forthwith’ to a labour officer. Case law on the meaning of ‘forthwith’ under the old law, is useful. It has been held that the word ‘forthwith’ is not as peremptory as ‘immediately’, and means ‘within a reasonable time’ or ‘without unreasonable delay’.¹⁹ In *Standard Chartered Bank Zimbabwe Ltd v Matsika*,²⁰ Gubbay CJ held the meaning of ‘forthwith’ as ‘as soon as is reasonably possible in the circumstances’.

Whatever the formulation, it is clear that ‘forthwith’ does not mean ‘immediately’ but ‘within a reasonable time’. Reasonableness is depend-

¹⁶ Section 6(1).

¹⁷ Section 6(2).

¹⁸ Section 6(4).

¹⁹ *Zulu v Sterling Products International Ltd* 1988 (2) ZLR 110 (H).

²⁰ 1996 (1) ZLR 123 (S).

ent on the circumstances of the facts of the case and the objectives of the statute. Given that the Model Code provides for a maximum of 14 working days for the investigation, hearing and final determination of the matter, a 'reasonable time' for purposes of serving a letter of suspension must be a very short time. In the scheme of the Model Code, two to three working days must be the maximum period contemplated. Anything beyond that period is difficult to characterize as 'forthwith'.

If the serving of the letter with reasons and grounds of suspension is not forthwith, the suspension is rendered a nullity.²¹ Similarly, the serving of a letter that offers no reasons also renders the suspension a nullity.²²

The reference to 'reasons and grounds' is significant. 'Reasons' refer to the alleged misconduct as specified in section 4. At this stage of being contained in the letter of suspension, the 'reasons' need not formulate the serious misconduct in the legal language of section 4. It is sufficient if the misconduct is couched in such a way that a reasonable person in the position of the employee would relate it to one or more of the specifications in section 4. 'Grounds' refer to the facts giving rise to the alleged misconduct. At this stage, they need not be detailed. They must be such that a reasonable person in the position of the employee would understand the basis of the alleged misconduct.

It is not permissible for an employer to suspend the employee without pay on one of the specified acts of misconduct and then, for the hearing, charge the employee on an entirely different ground.²³

The common law principle that an employer may defend an action for summary dismissal on any valid ground in existence at the time, even if he or she was not aware of it, does not apply under the Model Code.²⁴

Where a suspension is rendered invalid for whatever reason, the employee is regarded as not having been suspended and remains on the payroll. In such a situation, the employer has two choices; either re-suspend the employee on the same or another ground or initiate a process

21 *Standard Chartered Bank Zimbabwe Ltd v Matsika (supra)*; *ZESA v Bopoto* 1997 (1) ZLR 126.

22 *Tip Top Dry Cleaners (Pvt) Ltd v Karangura* 1997 (2) ZLR 420 (S).

23 *Standard Chartered Bank Zimbabwe Ltd v Matsika (supra)*; *Karembura v Mvurwi Rural Council* 1999 (1) ZLR 327 (SC).

24 For the common law principle, see *Rashayi v Bakasa African Council* 1978 RLR 389 (A) at 393C.

towards a disciplinary hearing on the same or another ground without re-suspending.²⁵

The employer is given the choice to suspend with or without pay. Given that under the common law, suspension is only permissible on full pay, the choice of the employer to suspend without pay must be made at the point of suspension, failing which the suspension shall be deemed to be with full pay.²⁶

An employer may subsequently ratify a suspension effected by any of its officials and such ratification retrospectively validates the suspension.²⁷ In principle, since a suspension is a separate juristic act from the investigation and the hearing, it may be challenged on review but the court has a discretion, which it will usually exercise to decline a review, given its interlocutory nature.²⁸ The suggestion in one Supreme Court case that the ‘suspension and the misconduct alleged against an employee are intertwined’ to the extent that where the suspension is set aside subsequent misconduct proceedings also fall away is incorrect.²⁹

Is it mandatory for an employer to suspend before invoking the disciplinary procedure under the Model Code? The answer is no. The word used in section 6(1) of SI 15/2006 is ‘may’. A suspension is not mandatory. The employer may institute disciplinary proceedings without suspending the employee as long as the employee is given adequate notice before the hearing.³⁰ Unlike the employee who is on suspension and has been served with reasons and grounds for suspension, an employee who has not been suspended and is being called for a disciplinary hearing may need a longer notice period than the minimum period of three working days in section 6(4)(a).

Where suspension is without pay and benefits

Where an employee is suspended without pay and benefits, he or she

25 *Karembura v Mvurwi Rural Council* 1999 (1) ZLR 327 (S) at 331-32.

26 *Makova v Urban Development Corp* 1992 (1) ZLR 326 (H).

27 *Zimbabwe Republic Police Board of Trustees v Manyangadze* 2005 (2) ZLR 38 (S).

28 *Nicholas v Fraser Alexander Zimbabwe (Pvt) Ltd* 2001 (2) 272 (H); *Tapfuma v Tudor House Consultants (Pvt) Ltd* 2002 (2) ZLR 1 (H).

29 See *Stella Nhari v Zimbabwe Allied Banking Group* SC 51/2013. The better view is to confine this case to its peculiar facts.

30 See *Standard Chartered Bank Zimbabwe v Matsika* (*supra*) 1996 (1) ZLR 123 (S); *Stella Nhari v Zimbabwe Allied Banking Group* (*supra*) at p. 5..

becomes disentitled to the receipt of pay and other benefits until the suspension is removed.³¹ If the employee refuses to surrender the benefits, such as by refusing to vacate the employer's house or to return the employer's motor vehicle, the employer is entitled via the *rei vindicatio* to seek an appropriate order from the High Court.³² If the employee has not challenged the legality of the suspension without pay and benefits, the employer need not wait for the outcome of the main labour dispute before approaching the High Court for an order of eviction from the house or the return of the motor vehicle.³³ Conversely, if the employee is also challenging the suspension without pay and benefits itself, as distinct from defending herself or himself in the main disciplinary proceedings, the employer has to wait for the outcome of the main dispute before seeking an order to repossess its assets.

If an employee, while on suspension without pay and without challenging the suspension itself, resigns, the resignation does not absolve the suspension. The employee would still not be entitled to any pay or benefits for the period of the suspension.³⁴ The position is the same where suspension does not arise and the employee is already challenging his or her dismissal.³⁵

Where many employees are involved in acts of misconduct, it appears permissible to single out an employee for disciplinary action.³⁶ All that is required is that the employer has good cause to believe that the employee has committed an act of misconduct. In the *Mashonaland Turf Club case* (*supra*), the court said:

*The fact that the respondent was singled out for disciplinary action becomes irrelevant once it is accepted that his misconduct went to the root of his employment contract.*³⁷

Thus the fact that other employees involved in similar acts of miscon-

31 *Chisipite School Trust (Pvt) Ltd v Clarke* 1999 (2) ZLR 324 (S).

32 *Ibid.* See also *Zimbabwe Broadcasting Holdings v Gono* 2010 (1) ZLR 8 (H); *Medical Investments Ltd v Pedzisayi* 2010 (1) ZLR 111 (H).

33 *Ibid.* See also *Tafuma v Tudor House Consultants (Pvt) Ltd* 2002 (2) ZLR 1(H).

34 *Tafuma v Tudor House Consultants (Pvt) Ltd* 2002 (2) ZLR 1 (H).

35 *Zimasco (Pvt) Ltd v Marikano* 2010 (2) ZLR 167 (H); *Medical Investments Ltd v Pedzisayi* 2010 (1) ZLR 111 (H); *DHL International (Pvt) Ltd v Madzikanda* 2010 (1) ZLR 201 (H); *Moyo v Gwindingwi NO & Anor* 2011 (2) ZLR 368 (H).

36 *Mashonaland Turf Club v Mutangadura* 2012 (1) ZLR 183 (S).

37 At p. 186A.

duct have not been charged is irrelevant³⁸ In cases involving the word of one witness against that of the accused employee, it is difficult but not impossible to prove the misconduct on a balance of probabilities.³⁹

Where an employer has been aware of certain acts of misconduct for a long time and has done nothing about it, it may not have ‘good cause’, if the circumstances are such that it may be taken to have waived its right to suspend or dismiss, in other words, the employer is taken to have condoned the misconduct.⁴⁰ The onus is on the employee to prove condonation or waiver.⁴¹

The hearing that must be conducted into the alleged misconduct of the employee must meet the standards of procedural fairness provided for in section 6(4) of SI 15/2006. The following are most important:

Investigation: Before the hearing, the employer is required to investigate the matter. There is no prescribed method of investigation. Investigation is the process of gathering facts and evidence. During this process, the employee may be interviewed and asked to make written responses to enquiries. At the investigation stage, the employee is not entitled to representation.

The charge: The employee must be informed of the charge being faced. The charge is a separate legal requirement from the ‘reasons and grounds’ contained in the letter of suspension. It must be written and must emanate from the reasons and grounds already served on the employee in the letter of suspension. The charge must refer directly and strictly to section 4 of SI 15/2006. It must indicate, with clarity, which specific acts of misconduct in section 4 are being faced. However, the employer may be required to read and explain it to the employee if the personal circumstances of the employee are such that any reasonable person in the position of the employer would read and explain the charge to such an employee.

Reasonable notice of the hearing: The employee is entitled to reasonable notice of the hearing to enable him or her to prepare. Section 6(4) (a) provides for ‘at least three working days notice’. Whether or not the notice period given is sufficient or reasonable varies from case to case,

38 *Vimbainashe Theophelus Dube v Standard Chartered Bank Ltd* SC 105/2004 at p. 8.

39 *Gauntlet Security Services (Pvt) Ltd v George Mubaiwa* SC 26/2003.

40 *Sterling Products International Ltd v Zulu* 1988 (2) ZLR 293 (S) at 303-04.

41 *Ibid.*

depending on the nature and complexity of the charges. However, given that the entire process from suspension to the final resolution of the case must be within 14 working days, the notice period cannot be significantly longer than the three working days prescribed as a minimum.

Representation of the employee: The employee is entitled to appear in person and be represented by either a fellow employee or workers' committee member or trade union official or a legal practitioner.⁴²

Calling witnesses: The employee is entitled to call witnesses in support of his or her responses to the charges. This right is almost absolute as it is given directly by the regulations. It can only be refused where the calling of a witness is so frivolous as to amount to an abuse of the procedure. At the heart of the right of the employee to call witnesses is the principle that the employee be given a fair and reasonable opportunity to state his or her case.

Cross-examination of witnesses: The employee has a right to cross-examine witnesses giving evidence in support of the employer's case. This requires that the witnesses give evidence in the presence of the employee.

Decision on whether or not employee is guilty: This decision must be made and communicated to the employee separate from the decision on the appropriate penalty. The Model Code follows the pattern used in criminal trials: the verdict is separate from the decision on sentence. This is so because section 6(4)(e) entitles the employee to address in mitigation before the penalty is imposed. It is not permissible under the Model Code to make a decision on the guilt or otherwise of the employee at the same time as the decision on the penalty. The decision on guilt must be communicated to the employee and must be accompanied by reasons.

Where an employee is facing two or more charges, the employer is perfectly entitled, at the hearing, to determine the employee's fate on the basis of one of the charges, either because the facts for that charge are common cause or the charge is easy to prove.⁴³ However, if the employer abandons the other charges and the employee is found not guilty on the charge pursued, the employee is deemed to have been acquitted on the abandoned charges.

Address in mitigation: The employee has a right to address in mitigation before the ultimate penalty is imposed. Some of the factors that may be addressed in mitigation are in section 7 and include being a first

⁴² Section 6(4)(b).

⁴³ *Samkange v Wycombe Foundation* 2001 (1) ZLR 80 (S) at 81E.

offender⁴⁴ and making reference to penalties in similar offences.⁴⁵ Where the employer wishes to rely on aggravating factors, these must be communicated to the employee before the address on mitigation so that the employee may respond to them.

Decision on penalty: After the address in mitigation, a decision on an appropriate penalty must be made and communicated to the employee with reasons. If it is a dismissal, the reasons must address the issues in section 7 of SI 15/2006 and 12B(4) of the Act. The dismissal penalty is not mandatory and should normally be a last resort. In terms of section 12B(4) of the Act, the following factors must be taken into account to assess whether or not a penalty other than dismissal may be warranted: length of the employee's service; the employee's previous disciplinary record; the nature of the employment and any personal circumstances of the employee. Ultimately, it is at the discretion of the employer, but the decision may be set aside on appeal if unreasonable.

Penalty without a hearing? A warning is a penalty. A disciplinary hearing must be held before a warning is issued.⁴⁶ There are also cases involving public bodies, such as local authorities, where a board of inquiry may recommend dismissal to the appropriate organs. If the recommendation is accepted and dismissal effected without subjecting the employee to a disciplinary hearing, the dismissal is a nullity.⁴⁷ Proceedings of a board of inquiry or commission of inquiry or investigating committee are not disciplinary proceedings, they are merely fact-finding and their recommendations merely constitute the basis for a disciplinary hearing.

Removal of suspension where misconduct not proved: Where the misconduct is not proved, the employer must remove the suspension and reinstate the employee and provide back pay and benefits from the time of the summary suspension. There is no question of damages under the model law nor is there room for the principle that the employer, despite failure to prove the grounds of suspension, may opt to pay damages in lieu of reinstatement. This is because this is an internal process entirely under the control of the employer. If the employer's own process fails to

44 Section 7(1).

45 Section 7(2).

46 *Director of Works & Anor v Nyasulu & Ors* 2002 (1) ZLR 658 (S).

47 See for example *Cherera v Chitungwiza Municipality* 2000 (2) ZLR 273 (H).

prove the misconduct of the employee, there can be no basis whatsoever for the termination of the employee's contract. Section 6(2)(b) is clear and unambiguous: the suspension is 'removed' if the grounds of suspension are not proved.

Appeal: There is an appeal to an Appeals Officer or Appeals Committee and thereafter a reference to a labour officer or designated agent of an NEC who will act in terms of section 93 of the Labour Act.⁴⁸ If there is neither an Appeals Officer nor an Appeals Committee, the matter is referred direct to a labour officer or designated agent of an NEC.⁴⁹

Interference with the penalty on appeal: It is clearly accepted that section 12B(4) gives the arbitrator and the Labour Court a discretion.⁵⁰ It gives the arbitrator or Labour Court the power to substitute a penalty other than dismissal.⁵¹ In *Mashonaland Turf Club v Mutangadura*⁵² the Supreme Court cautioned the Labour Court and arbitrators against an enthusiastic application of section 12B(4). Ziyambi JA said:

*In the exercise of their powers in terms of s12B(4) of the Labour Act, the Labour Court and arbitrators must be reminded that the section does not confer upon them an unbounded power to alter a penalty of dismissal imposed by an employer just because they disagree with it. In the absence of a misdirection or unreasonableness on the part of the employer in arriving at the decision to dismiss an employee, an appeal court will generally not interfere with the exercise of the employer's discretion to dismiss an employee found guilty of a misconduct which goes to the root of the contract of employment.*⁵³

The Supreme Court does not seem to appreciate the import, and is bent on limiting the scope, of section 12B(4). In *ZB Financial Holdings*

48 Section 8(3).

49 Section 8/6 9 SI 15/2006.

50 See generally *NEI Zimbabwe v Lynette Makuzva* SC 24/2006; *City of Mutare v Agatha Samupindi* SC 2/2006. These cases were decided on other points and an opportunity to explore the scope of 12B(4) was missed. However, the Supreme Court proceeded on the basis of the existence of a discretion under 12B(4).

51 *NEI Zimbabwe v Makuzva* 2006 (1) ZLR 462 (S).

52 2012 (1) ZLR 183 (S).

53 At p. 186B-C.

*v Maureen Manyarara*⁵⁴ the Labour Court had set aside the penalty of dismissal and had substituted a penalty of a final warning. The employee had been found guilty of participating in an unlawful collective job action. The Labour Court had taken into account three factors, namely that (i) the participation was for two hours, (ii) the duration of the collective job action was short and (iii) there was no evidence of previous convictions. The Supreme Court set aside the Labour Court's decision and restored the penalty of dismissal on the basis that there had been no misdirection on the part of the employer in the exercise of its discretion. Said Malaba DCJ:

*The court [Labour Court]] clearly did not apply its mind to the fact that it was dealing with a case of an exercise of discretion by an employer and that it could not interfere with the decision to dismiss without a finding of misdirection on the part of the employer. The reliance on the fact of the respondent being a first offender to set aside the dismissal in the absence of a finding of misdirection on the part of the employer was improper.*⁵⁵

In *Innskor Africa (Pvt) Ltd v Letron Chimoto*⁵⁶ the employee was convicted of conduct inconsistent with the fulfilment of the express or implied terms of his contract of employment. It had been alleged, that as a pizza maker, he had produced a pizza without having received the necessary docket authorizing its production. The pizza cost was US\$4. The disciplinary committee and the arbitrator stated that the offence was of a serious nature as it involved an element of dishonesty and had dismissed the employee. The Labour Court set aside this penalty. It held that the arbitrator had not taken into consideration that the employee was acting under pressure and that the employer had not suffered any prejudice as the pizza was worth only US\$4. The Labour Court also said the penalty should have been corrective rather than punitive. On appeal, the Supreme Court set aside the Labour Court's decision and restored the penalty of dismissal. Again Malaba DCJ said:

The issue of prejudice was irrelevant to the assessment of an appropriate penalty because the purpose of the introduc-

⁵⁴ SC 3/2012.

⁵⁵ At p. 2.

⁵⁶ At pp. 2-3.

tion of the docket system was to obviate dishonest conduct on the part of pizza makers. The finding that the pizza was only US\$4 was of no consequence. The offence committed involved a betrayal of trust and confidence reposed in the respondent by the appellant thereby going to the root of the relationship between the employer and employee...

A principle has now been firmly established to the effect an appellant court should not interfere with an exercise of discretion by a lower court or tribunal unless there has been a clear misdirection on the part of the lower court. In this case the Labour Court did not even appreciate that it was dealing with a case of an exercise of discretion by the arbitrator. The Labour Court merely substituted its own discretion for that of the arbitrator without finding any recognizable misdirection on the part of the arbitrator.⁵⁷

In *Tregers Plastics (Pvt) Ltd v Woodreck Sibanda & Anor*⁵⁸ the respondents, who had worked for the employer for 14 and 16 years respectively, had breached a policy of the company which said that cash purchases should be paid for on the date on which the invoices were generated. The respondents made cash purchases which they invoiced on Friday afternoon but only paid for them the following Monday. They were charged, convicted and dismissed. The arbitrator found the penalty of dismissal excessive and ordered their reinstatement. This was confirmed by the Labour Court. The Labour Court was of the view that the misconduct did not go to the root of the contract of employment. On appeal, the Supreme Court set aside the Labour Court's decision and restored the penalty of dismissal. The Supreme Court's views were that, (i) the misconduct went to the root of the contract of employment as it violated trust and confidence, (ii) the employer had exercised its discretion to dismiss and there was no misdirection warranting interference by an appellant court, and (iii) the Labour Court took into account irrelevant considerations such as that the respondents paid for the goods, that there was no prejudice and that the respondents were serving employees. Be that as it may, the correct position of the law is that section 12(B)4 gives an arbitrator the power to interfere with the

⁵⁷ At pp. 2-3.

⁵⁸ SC 22/2012.

employer's discretion and substitute a penalty other than dismissal if, after taking into account all the factors mentioned in the section, the arbitrator is of the view that the employer acted unreasonably. Reasonableness is based on the standard of an impartial decision-maker, taking into account the factors in section 12(B)4.

Who may investigate a matter and conduct a hearing into alleged misconduct?

The Model Code provides for some matters which can only be done by the employer and others which may be done on behalf of the employer. It is the employer who must have 'good cause' to believe that the employee has committed a misconduct.⁵⁹ Similarly, only the employer may suspend the employee with or without pay. It is also the employer who must serve the employee with a letter of suspension with reasons and grounds of suspension. Although section 6(2) says the employer 'shall... investigate the matter and conduct a hearing into the alleged misconduct', section 6(4)(b) provides that a hearing may be conducted by 'the employer or the employer's representative or disciplinary authority'. This suggests that it is permissible for the employer to appoint a representative to investigate the matter and conduct a hearing into the alleged misconduct. The expression 'employer's representative' is not defined, but may be safely taken to have its ordinary signification of any person who is duly authorized by the employer. There is nothing to suggest that this must be restricted to a senior manager or person of authority in the employer's enterprise. What is material is that the person acting as representative has the full authority of the employer. While an 'employer's representative' may be appointed for a particular case and be changed from case to case, it is not permissible to set up an 'authority' or a disciplinary committee for a particular case. This arises from the definition of 'disciplinary authority' to mean:

... a person or authority or such disciplinary committee dealing with disciplinary matters in an establishment or at a workplace.

There are three distinct entities, each of which qualifies as a disciplinary authority. A workplace/establishment can only have one of them. They are mutually exclusive: it is not the intention of the Legislature to

⁵⁹ Section 6(1).

give the employer a choice each time there is a disciplinary matter. It cannot be *ad hoc*.

A 'disciplinary committee' is defined as 'a committee set up at the workplace/enterprise composed of employer and employees representatives to preside over and decide disciplinary cases and/or worker grievances'.⁶⁰ Although 'authority' is not defined, it refers to a body set up by a legal instrument such as a statute or a constitution (in the case of voluntary associations). In *Black's Law Dictionary*, the third sense in which 'authority' as defined is 'a governmental agency or corporation that administers a public enterprise'. In the *Oxford English Reference Dictionary*, 'authority' is defined as 'a person or body having authority, esp political or administrative'. In the context of a 'disciplinary authority', an 'authority' is a body already set-up by statute or the constitution to deal with disciplinary matters. If there is no such body already established by the governing rules of the employer, there can be no 'authority'. With public bodies set up by statute, authority refers to the disciplinary body created therein, such as a 'staff disciplinary committee' in the case of State universities. With voluntary associations, the constitution may provide for an entity responsible for disciplinary matters. 'Authority' does not refer to a committee set up, or a person appointed, by the employer.

Despite reference to the option of the hearing being conducted by 'the employer', this is subject to basic principles of natural justice, such as the *nemo iudex* rule (one cannot be a judge in one's own cause). It cannot be a fair hearing for the same person who is investigating the matter and laying the charges to be the presiding officer. There is no room for a preconceived conviction of the employee under the Model Code. The hearing in section 6(4) must be *bona fide*. Where the hearing is not likely to be *bona fide* if conducted by the employer, the employer has no choice but to appoint a representative if there is no disciplinary authority in the establishment or the workplace.

Where employee fails or refuses to attend

Although it is clear that the employee is entitled to be given an opportunity to be heard by, *inter alia*, attending the hearing, this right may be abandoned or waived by the employee.⁶¹ Thus, where an employee fails or refuses to attend, the question is one of establishing whether or

⁶⁰ Section 2, SI-15-2006.

⁶¹ *Munyuki v City of Gweru* 1998 (1) ZLR 182 (S).

not the failure or refusal amounts to an abandonment or waiver of the right to attend. An employee who persistently fails to attend without a reasonable or valid excuse or who deliberately puts himself or herself in a position not to attend is taken to have abandoned or waived his or her right.⁶² To establish waiver or abandonment, the courts will normally insist on the employee having failed to attend without a reasonable cause on more than one occasion. *Munyuki v City of Gweru*⁶³ is a leading case. The employee was suspended because of suspected misconduct. The suspected misconduct also led to criminal charges being brought against him. Before the criminal trial began, he was called to a disciplinary hearing by the employer. He had submitted to the disciplinary committee a written response in which he denied all the charges and set out his defence. However, he refused to attend the hearing, claiming that it would prejudice his criminal trial. The prejudice, he claimed, would arise in that he might be compelled to disclose incriminating information during the disciplinary hearing. The disciplinary committee decided that the disciplinary hearing must proceed and notified the employee. He did not attend. The hearing was postponed to give the employee a second opportunity. Again the employee did not attend. On the second occasion, the disciplinary hearing proceeded in his absence. The committee took into account his written statements and recommended his dismissal. The Supreme Court was of the view that the employee's reason for not attending was invalid as he would not have been prejudiced in any way. Gubbay CJ said:

*Although it is a fundamental legal principle that an employee charged with misconduct by the employer has a right to be heard, I have no difficulty in accepting that such right may be abandoned or waived. There is no compulsion upon the employee to attend the hearing. Non-attendance is not a disciplinary offence unless specified in the pertaining code. If the employee does not attend, however, he abandons his right to be present and the hearing may proceed in absentia.*⁶⁴

The reason for failure or refusal to attend must be adjudged invalid

62 Ibid.

63 Ibid.

64 At p. 186F.

or unreasonable. In *Forestry Commission v Moyo*,⁶⁵ the employee, at the inception of the hearing, asked whether or not his travel and subsistence allowances incurred in attending the hearing would be reimbursed. Upon being informed that he would not be reimbursed, he walked out in protest. The hearing proceeded in his absence and he was found guilty and dismissed. It was held, *obiter*, that the reason for walking out was invalid or unreasonable. It would have been different if the reason had related to a procedural defect in the conduct of the proceedings.

The hearing, in the absence of the employee, was held to be valid. Gubbay CJ said:

*The second and alternative ground, as I understand it, was that the respondent ought to have been afforded the opportunity to be heard even though he had walked out of the inquiry. I am unable to agree. If the cause of the respondent's abrupt departure had been because of a procedural defect in the conduct of the proceedings, his attitude would have been understandable. The respondent had been told that he would not be reimbursed his travel and subsistence expenses. Whether that decision was right or wrong was of no relevance. It remained open to the respondent to challenge it by recourse to the law. His exit indicated that he had no intention of participating in the inquiry. He took a calculated risk that it would proceed without him. There was, in my opinion, no obligation upon the investigation panel to postpone the hearing and call upon the respondent to appear at another date. The audi alteram partem rule was not violated.*⁶⁶

In *David Moyo v Rural Electrification Agency*⁶⁷ the appellant was employed by the respondent as an accounting officer. He was suspended on charges of habitual and substantial neglect of duties in terms of the Model Code. He was advised of his right to appear in person or with a legal practitioner and warned that, in the event of his non-attendance, the hearing would proceed in his absence. Notwithstanding this advice, he travelled to South Africa a few days before the hearing, without leave of absence and without seeking a postponement of the hearing. The hear-

65 1997 (1) ZLR 254 (S).

66 At p. 262.

67 SC 4/2014.

ing proceeded in his absence. He was found guilty and dismissed. On his return some three months later, he challenged his dismissal. He raised two grounds, namely (i) he had not been heard in person as required by the Model Code, and (ii) the proceedings had not been concluded within 14 days as provided for in section 6(2) of SI 15/2006. The Supreme Court held that, by deliberately absenting himself, he waived not only the right to challenge the irregularity of not being heard in person but also the right to challenge other irregularities associated with the proceedings. This is what the court said:

In our view, the appellant, by deliberately absenting himself without leave from the hearing, waived his right to challenge the conduct of the disciplinary proceedings. He had the option, which he did not exercise, of seeking a postponement since he knew he would not be available on the date of the hearing. In these circumstances, we do not feel that the failure by the respondent to strictly comply with the Regulations operated to vitiate the disciplinary proceedings.⁶⁸

Failure to comply with the 14-day period

It is clear from the scheme of the Model Code that the 14-day period applies to the entire proceedings. If that were not so, there would not be a time-limit to the proceedings, a result clearly at odds with the Labour Act's protection of employees against unfair dismissal. The legal effect of failing to complete the disciplinary process within 14 days is not expressly provided for in the Model Code. There are three possible answers. One is that failure to meet the time-limit renders the proceedings a nullity. The other is that it merely creates a dispute entitling the aggrieved party to refer the matter to a labour officer in terms of section 93. The third is that it merely gives the employee the right to apply for a remedy, called a *mandamus*, compelling compliance with time-limits⁶⁹. It is submitted that, by necessary implication, failure to complete the disciplinary process within the 14-day period renders it a nullity. The employee is then treated as if no disciplinary process had ever been initiated. However, on the principle in *Standard Chartered Bank v Matsika (supra)*, the employer is not precluded from initiating fresh proceedings

68 At p. 1.

69 See some *obiter* remarks in *Stella Nhari v Zimbabwe Allied Banking Group* SC 51/2013 at p. 6.

either on the same or different charges. An order of *mandamus* is only available in the High Court and it could never have been the intention of the frames of the Model Code that the failure to comply with the 14-day period merely entitles the aggrieved party to have such a remedy.

Specified acts of serious misconduct

- (a) Any act of conduct or omission inconsistent with the fulfilment of the express or implied conditions of the contract of employment

This ground is wide enough to cover virtually every circumstance which is not expressly mentioned in the other paragraphs but which, under the common law, could be regarded as a material breach warranting summary dismissal. Thus, participation in an illegal strike has been held to be misconduct under this paragraph.⁷⁰ In *Tobacco Sales Floors Ltd v Chimwala*,⁷¹ the misconduct relied on included the making of secret profits, a breach of trust owed to tobacco growers and a breach of the law governing the industry in which the employee worked. The case is authority for the view that the misconduct should be serious to warrant summary suspension. McNally JA said:

*I consider that the seriousness of the misconduct is to be measured by whether it is 'inconsistent with the fulfilment of the express or implied conditions of his contract'. If it is, then it is serious enough prima facie to warrant summary dismissal. Then it was up to the employee to show that his misconduct, though technically inconsistent with the fulfilment of the conditions of his contract, was so trivial, so inadvertent, so aberrant or otherwise so excusable, that the remedy of summary dismissal was not warranted.*⁷²

There are two stages envisaged in this ground. The employer must show that the misconduct is inconsistent with the fulfilment of the express or implied conditions of the contract of employment. If this onus is discharged, it is then for the employee to show that the misconduct, though technically inconsistent with the fulfilment of the conditions of his or her contract, is trivial or inadvertent or otherwise not so serious as

70 *Kadoma Magnesite (Pvt) Ltd v Acting Regional Officer & Ors* 1991 (1) ZLR 283 (H).

71 1987 (2) ZLR 210 (S).

72 At pp. 218H-219A.

to warrant being covered by this ground.⁷³

It is submitted that the use of the wide word ‘any’ in paragraph (a) does not change the view that not every inconsistency warrants summary suspension – the circumstances must be such as would have warranted summary dismissal under the common law.

In practice, this ground is relied on where none of the other grounds is suitable. Cases of gross negligence are covered by this ground.⁷⁴ In *Standard Chartered Bank Zimbabwe v Matsika (supra)*, this ground was relied on by the bank to dismiss a bank manager on the basis that, in recommending to the bank’s office that a customer’s application for an overdraft be approved, the bank manager negligently made misrepresentations. In *ZESA v Bopoto* this ground was relied on to dismiss a senior employee who had been convicted of negligent driving and who, at work, had given orders to his subordinates who violated budgetary controls and procurement procedures. In *Winterton, Holmes, & Hill v Paterson*⁷⁵ the employers (a firm of legal practitioners) sought to rely on these ground to dismiss a professional assistant with whom differences had arisen over her assessment of fees to be charged for services rendered to clients and over her methods of communication and general attitude towards the partners of the firm. In *Standard Chartered Bank Zimbabwe Ltd v Chapuka*⁷⁶ the employee was a senior bank employee. He obtained cheques from the bank to pay building contractors or suppliers of building materials for his house. This was under a scheme to assist employees to build their own homes. Instead of paying the cheques to the payee, he altered the names of the payees and paid the cheques into his wife’s account, from which he withdrew the bulk of the proceeds. The employee was dismissed on this ground, despite the fact that he had no intention to defraud the employer and that the employer had not been prejudiced. The Supreme Court was of the view that the misconduct was serious as it undermined the trust and confidence between the parties.

Dishonesty is clearly inconsistent with the terms and conditions of

73 *Standard Chartered Bank Zimbabwe v Chapuka* 2005 (1) ZLR 52 (S); *Tobacco Sales Floors Ltd v Chimwala (supra)* and the English cases cited therein.

74 For illustrations of cases of ‘gross negligence’ see *Standard Chartered Bank Zimbabwe Ltd v Chipingu* 2004 (2) ZLR 94 (S); *Nyahuma v Barclays Bank (Pvt) Ltd* 2005 (2) ZLR 435 (S).

75 1995 (2) ZLR 68 (S).

76 2005 (1) ZLR 52 (S).

employment. In *NEI Zimbabwe v Lynette Makuzva*,⁷⁷ a document in an envelope marked 'private and confidential' went missing. The employees were questioned and none of them admitted any knowledge of the whereabouts of it. Some plain clothes investigators were called in and conducted a massive search in offices and motor vehicles. The document was later found in the respondent's vehicle, hidden under the carpet inside the boot. This was held to be conduct inconsistent with the terms and conditions of employment. It was serious misconduct.

Where an employee who has custody of money causes a shortfall which is recovered from him or her, the conduct remains serious and the employee may be dismissed on this ground.⁷⁸

What of criminal conduct outside the workplace and unrelated to the contract of employment? Criminal conduct unrelated to the contract of employment would constitute misconduct inconsistent with the fulfilment of the express or implied conditions if it is so 'grossly immoral that all reasonable men would say that he cannot be trusted' and therefore the employer may dismiss him.⁷⁹

(b) Wilful disobedience to a lawful order

The *locus classicus* is *Materike v CT Bowring & Associates (Pvt) Ltd*.⁸⁰ The facts are that the employee was the chairman of the workers' committee. Between June 1984 and August 1985, the committee complained of racial discrimination by the employer in relation to promotions, salary structures and appointments. These complaints were reported to the Ministry of Labour. In January 1986, the employee was informed that he had been appointed acting broker to replace an executive broker who had left and had vacated his office. The employee was unhappy at not being promoted to the position of the executive broker. The following day he informed one of his supervisors that he was moving into the office vacated by the previous executive broker. He was advised against such an action, but installed himself in the office anyway. At noon he was ordered to vacate the office; he did not do so, and it was clear that he had no intention of doing so. At 3.50 p.m., he was suspended without pay for wilful

⁷⁷ SC 24/2006.

⁷⁸ *Muchenje v Bata Shoe Company* 2003 (2) ZLR 462 (S),

⁷⁹ *Standard Chartered Bank Zimbabwe Ltd v George Musanhu* SC 122/2004; *Pearce v Foster* (1886) QB 536 at 539; *Cluston & Co. Ltd v Carry* [1906] AC 122.

⁸⁰ 1987 (1) ZLR 206 (S).

disobedience to a lawful order. In all hearings up to the Supreme Court, the employee's case was that he had occupied the office out of frustration at the racial discrimination of the employer, and that remaining in the office was a protest against the discrimination.

The Supreme Court dismissed the appeal and held that the employee had been properly dismissed for 'wilful disobedience to a lawful order'. It spelled out three aspects of the law.

Firstly, although 'wilful disobedience' is not defined in the Model Code, having regard to the purpose of the legislation and the common law grounds for wilful disobedience, the words 'connote a deliberate and serious refusal to obey, knowledge and deliberateness must be present. Disobedience must be intentional and not the result of mistake or inadvertence.'⁸¹ The disobedience must be sufficiently grave so as to go to the root of the contract. The court widened the availability of this ground to employers by rejecting the view expressed in *Burnett v Standard Tobacco Co. Ltd*⁸² that the employee must have the intention to repudiate the contract for disobedience to warrant summary dismissal. The Supreme Court said intention was not relevant. In other words, disobedience can still retain the character of being serious and going to the root of the contract of employment even where it does not amount to a repudiation of the contract of employment.⁸³

Secondly, a 'lawful order' against which the disobedience is directed, merely means that the employee cannot be bound to obey an order to do something not related to the character or capacity of the contract of employment. Thirdly, the existence of a moral excuse for such disobedience is irrelevant; it will not make the disobedience any less wilful or the order any less lawful.

Subsequent cases have endorsed and sometimes amplified these three features of the *Matereke* case (*supra*). In *National Foods Ltd v Masukusa*⁸⁴ emphasis was placed on the fact that the disobedience must be such as is likely to undermine the relationship between the employer and the employee. In that case, Masukusa made derogatory statements about the status and position of the black managers of National Foods, accused one of its white managers of being a 'racist', described a messenger of court

81 At p. 211.

82 1957 R & N 508 (SR).

83 *Samkange v Wycombe Foundation* 2001 (1) ZLR 80 (S) at 82H.

84 1994 (1) ZLR 66 (S).

who attempted to serve a garnishee order on him at the workplace as a ‘colonialist and imperialist’ and threatened to kill him and generally refused to take orders. It was held that this conduct undermined the employment relationship.

The element of ‘wilfulness’ was emphasized in *Chironda v Swift Transport*.⁸⁵ Not every omission to comply with a lawful order is ‘wilful’. The requisite *mens rea* is ‘intention to hold authority at defiance’ and this must be established in each case. In this case, the employer gave specific instructions to its delivery messengers, including Chironda, to place returned parcels for customers who had closed for Christmas in a particular box. This was a departure from the rule and only applied during Christmas. Chironda returned with some parcels for two customers and, instead of following the new system, he followed the normal procedure of handing over the parcels to the supervisor. The Labour Relations Tribunal found, as a matter of fact, that Chironda had been given a lawful order to place returned parcels in a particular box. The Tribunal seemed to have concluded that the disobedience was thereby wilful, but the Supreme Court reversed the decision on the basis that there was no evidence that the omission to comply was ‘wilful’.

In *Muchakata v Netherburn Mine*⁸⁶ the element of ‘lawfulness’ was emphasized. Muchakata was employed as a security sergeant, under whom were several security guards. After reports of indiscipline among security guards reached the top management, the latter ordered Muchakata to take disciplinary action against the employees and he bluntly refused. He was suspended on the ground of ‘wilful disobedience to a lawful order’. He argued that the order was unlawful because it was not a term of his contract of employment to preside over disciplinary cases. The Supreme Court agreed and he was reinstated. Similarly, in *ZUPCO v Mabande & Anor*⁸⁷ the employees, who were driving instructors, were ordered to drive passengers when omnibus drivers were on strike. The order was held to be unlawful as it was not a term of the contracts of employment of the instructors.

However, in *ZCTU v Makonese*⁸⁸ the Supreme Court appeared to widen the scope of an employee’s duties, thereby making it easier for

85 1996 (1) ZLR 142 (S).

86 1996 (1) ZLR 153 (S).

87 1998 (2) ZLR 150 (S).

88 2005 (1) ZLR 430 (S).

the employer to prove the lawfulness of orders. It held an order lawful even where it was not strictly in relation to a duty of the employee but was ‘closely related to the duties’, provided that (i) it was capable of being carried out by the employee, (ii) it was for the advancement of the employer’s business and (iii) it was not a wrongful act. In that case, the employee, who was the head of the organizing department of the ZCTU, was accused of having refused to drive a vehicle assigned to his department because it was ‘labeled with the ZCTU logo’. The Labour Relations Tribunal had ruled in favour of the employee, on the basis that the employee’s duties were not of a driver, rendering the order unlawful. The Supreme Court disagreed, holding that it was sufficient that the order was ‘closely related to the duties of the employee.’⁸⁹ Cheda JA made the point thus:

His duties involved organizing conferences and seminars. The vehicle was issued to him for that purpose; and the instruction to drive was for the purpose of taking officials to a conference. I do not agree that this was an instruction to carry out a duty that was unrelated to the nature of his employment

In *PTC v Chihoro*⁹⁰ the question of a moral excuse arose in relation to sickness. The respondent was employed as a postal messenger. One afternoon he was feeling unwell and asked to leave early to visit his doctor but was told to continue work until 3 p.m. He was asked to deliver some telegrams. He delivered some of the telegrams but, despite being ordered to do so, he refused to complete the delivery on the grounds that he had to be attended to by his doctor. He was suspended on the ground of ‘wilful disobedience to a lawful order’. The Supreme Court held that a sick employee is only justified in disobeying an order relating to the character or capacity of his contract of employment if the illness is such as to make compliance with the order impossible. In this instance, the employee was not faced with an emergency, and so the order was therefore not unreasonable. At most the respondent had a moral excuse for the disobedience but that was irrelevant.

In *Samkange v Wycombe Foundation*⁹¹ the employee, who had been

⁸⁹ At p. 432D.

⁹⁰ 1997 (1) ZLR 148 (S).

⁹¹ 2001 (1) ZLR 80 (S).

suspended for misconduct, genuinely believed that his suspension was unlawful. Based on that belief, he refused to obey his employer's order to vacate his office and surrender the motor vehicle he had been permitted to use. The employer suspended him again and raised, as an additional ground for dismissal, 'wilful disobedience to a lawful order'. The Supreme Court held that his genuine belief in the unlawfulness of his suspension did not make his disobedience any less wilful.

A moral excuse was unable to save a 'tired and hungry' employee who had worked for a continuous nine hours in *Zimbabwe Alloys Ltd v Muchohonyi*.⁹² On the relevant day, the employee was on duty from 3 p.m. to 10 p.m., and the worker who was supposed to relieve him had not arrived. The employee was instructed to continue working until a replacement was found. After working for another two hours, he left without the employer's permission, and was charged with wilful disobedience to a lawful order. The Supreme Court was emphatic that being 'tired and hungry' did not make the disobedience any less wilful. It is doubtful whether the order in this case can be said to be lawful. It is submitted that ordering an employee to work for more than nine hours is so unreasonable as to make it unlawful.

If an order is so unreasonable as to defy common sense, it is not a lawful order.⁹³ This is not to say that, in addition to being lawful, the order must also be reasonable, but that the reasonableness of an order may determine whether it is lawful or not. Unreasonableness may also go to the issue of whether or not the employee had a reasonable excuse for his or her behaviour.⁹⁴ If an employee erroneously perceives an order to be unlawful and disobey it, he or she is still guilty of wilful disobedience to a lawful order if the court determines the order to be lawful.⁹⁵

In *Mpumela v Berger Paints (Pvt) Ltd*,⁹⁶ the employer, a bookkeeper, was ordered by his manager to wear appropriate clothes to work, including a jacket and tie. He refused to comply with the order and continued to wear casual clothes. He was dismissed for wilful disobedience of a lawful order. The main issue on appeal to the Supreme Court was whether or not the order issued by the manager was a lawful one, given that

92 2006 (1) ZLR 389 (S).

93 *PTC v Chihoro* (*supra*).

94 *Henry Mandongwe v Art Corporation Ltd* S 15/2004.

95 *Agrifoods v J. Chiruka & Ors* SC 50/2003.

96 1999 (2), ZLR 146 (S).

the contract did not specify what clothing the employee had to wear. The court held that the order was lawful as it properly appertained to the character of the employee's contract. The manager was entitled to instruct the employee to wear appropriate clothing for a bookkeeper.

Sandura JA said:

*In my view, there is certainly no substance in the argument that the appellant was entitled to wear whatever clothes he wanted to wear. If that were the case, the appellant would have been entitled to go to work wearing a jogging suit or a track suit, which could hardly have been within the contemplation of the parties at the time the contract of employment was concluded, bearing in mind the fact that the appellant was employed as a bookkeeper.*⁹⁷

In *Mutare Board & Paper Mills v James Howard Mutsaka*⁹⁸ the employee was informed by his immediate supervisor that he was to be transferred to another section of the employer's stores department as a 'yard clerk'. His job title at the time of this instruction was 'stores issuing clerk'. The employee took the view that this changed his job description. He refused to sign the new job description. He was given a further instruction and refused again. He was charged with disobeying a lawful instruction, was found guilty and dismissed. The Labour Court set aside the dismissal but the employer appealed to the Supreme Court and won. The Supreme Court was not persuaded that the transfer from 'issuing clerk' to 'yard clerk' was a demotion. It held that the two jobs were the same and the immediate supervisor had authority to transfer him to another section. The instruction was therefore lawful and disobedience was an act of misconduct. His dismissal was held justified.

(c) Wilful and unlawful destruction of the employer's property

This is a straightforward ground. The act of destruction must be intentional. This ground is normally available when the destruction takes place in the course of a strike. Whether the strike is lawful or unlawful, any deliberate destruction of the employer's property constitutes a separate act of misconduct and is, in itself, sufficiently serious to warrant disciplinary action on this ground.

⁹⁷ At p. 150F,

⁹⁸ SC 2/2005.

(d) Theft or fraud

The standard of proof required to establish 'theft or fraud' is the usual 'proof on a balance of probabilities' and not 'proof beyond a reasonable doubt.'⁹⁹ Given the different standards of proof between civil and criminal cases, the mere fact that an employee has been acquitted by the court or has been released by the police for 'lack of evidence' does not disentitle an employer from using this ground, provided that the theft or fraud can be proved on a balance of probabilities.¹⁰⁰

As there is no specific definition of 'theft or fraud' in the Model Code, the essential requirements for the offences under the common law must be proved on a balance of probabilities. This makes the position different from some registered codes which define the offences with fewer requirements than under the common law and this has been held to be valid.¹⁰¹

The essential elements of the offence remain the same, whether in a disciplinary hearing under the Model Code or in a criminal trial. It is the standard of proof which is different. In other words, both the *actus reus* (the facts) and the *mens rea* (criminal intention) must be present to constitute theft or fraud.¹⁰²

(e) Absence from work for a period of five or more working days without reasonable excuse.

It was held in *Mhowa v Beverley Building Society*¹⁰³ that a 'reasonable excuse' is not the same thing as a 'lawful excuse'. A reasonable excuse may be something less than a lawful excuse so that the fact that an employee has no lawful excuse does not mean that he or she has no reasonable excuse. In this case, the appellant had been found guilty of negligence by the works council under the code of conduct and the penalty imposed was demotion. He notified the employer of his intention to appeal but was nonetheless told to report for work. He was, however, advised by his lawyer that the noting of the appeal suspended the decision of the works council and, on the basis of this advice, he did not report

99 *ZESA v Dera* 1998 (1) ZLR 500 (S).

100 *Girjac Services (Pvt) Ltd (supra)* 1999 (1) ZLR 243 (S).

101 *Zimbabwe Mining & Smelting Co. v Zakeyo* 2007 (1) ZLR 132 (S).

102 *Makuwaza v NRZ* 1997 (2) ZLR 453 (S).

103 1998 (1) ZLR 546 (S). See also *Machongwe v Redcliff Municipality* 1998 (2) ZLR 145 (S).

for work. He was charged and found guilty of being absent from work without reasonable excuse. This was set aside by the Supreme Court, which held that reliance on legal advice in the circumstances constituted a ‘reasonable excuse’.

Another example of a ‘reasonable excuse’ arose in *Business Equipment Corporation v Mtetwa*.¹⁰⁴ Mtetwa was dismissed from employment for misconduct. He appealed to the negotiating committee, which ordered his reinstatement without loss of salary and benefits. There was no alternative order for damages in lieu of reinstatement. The employer appealed to the Labour Court and failed. Mtetwa presented himself for duty, but he was told that the employer was going to file an appeal to the Supreme Court. As a result, he stayed away from work. He, however, also filed an appeal to the Supreme Court against the order of reinstatement, seeking an order for payment of damages as an alternative to reinstatement. Some seven months later, the employer, although aware of Mtetwa’s appeal, directed him to report for work. He did not report for work and was subjected to disciplinary proceedings on the charge of ‘absence from work ... without reasonable cause’. The Labour Court ruled that Mtetwa had a reasonable excuse, as he was awaiting the outcome of his appeal. This was endorsed by the Supreme Court, which said that since the noting of an appeal suspended the judgment appealed against, it was a reasonable cause to stay away from work pending the determination of the appeal.

- (f) Gross incompetency or inefficiency in the performance of his or her work

This ground must be read as referring to ‘gross incompetency or gross inefficiency’. They are not strictly the same. Competency refers to ability to do a thing, efficiency to the manner of doing it. Thus, for some tasks, ‘gross negligence’ is covered by ‘gross inefficiency’ but not by ‘gross incompetency’.

Under the common law, the employee undertakes to be reasonably competent in the performance of his or her work.¹⁰⁵ This ground is a modification of the common law and is therefore not available for mere breach of the common law duty of the employee. There must be ‘gross’ incompetency or inefficiency. Obviously, to be ‘gross’, the lack of competence must be below ‘reasonable competence’ and less than that of

104 2007 (2) ZLR 43 (S).

105 See Chapter 4.

an ordinarily incompetent employee. It must be either complete lack of competence or something close to it. Just as there is 'ordinary negligence' and 'gross negligence', there is also 'ordinary incompetency' and 'gross incompetency'.

As already noted, for some tasks 'gross negligence' falls under this ground as an aspect of 'gross inefficiency'. In *Merchant Bank of Central Africa v Dube*¹⁰⁶ it was said:

Although gross negligence is incapable of precise definition, an entire failure to give consideration to the consequences of one's actions or omissions, or a total disregard of one's duty would constitute gross negligence.

(g) Habitual and substantial neglect of his or her duties

This is a problematic ground. It is not 'gross negligence' but 'habitual and substantial neglect'. The word 'neglect' is not 'negligence'. What is also in issue are the words 'habitual' and 'substantial'. The 'neglect' must be both 'habitual' and 'substantial'. It is submitted that 'substantial' neglect is a neglect of a degree greater than 'ordinary neglect' but not necessarily up to the level of 'gross neglect'. What does 'neglect' mean?

Black's Law Dictionary defines 'neglect' as 'the omission of proper attention to a person or thing, whether inadvertent, negligent or wilful; the act or condition of disregarding.' It explains that 'neglect' is an objective fact, such as that a person has not done that which it was his or her duty to do. 'Neglect' does not indicate the reason for the failure: it may be wilful or negligent.

The word 'habitual' comes from 'habit', and connotes a number of acts. A single act cannot be 'habitual'. There is no hard-and-fast rule as to the number of acts of neglect required for there to be 'habitual neglect'.

This ground is therefore available where the employee has a propensity for neglecting his or her duties. There must be a past record of neglect, with each incident involving 'substantial neglect'. A single act of gross neglect will not suffice under this ground. An employer wishing to use a single act of gross neglect must rely on either 4(a) or 4(f).

(h) Lack of a skill which the employee expressly or impliedly held himself to possess

106 2004 (1) ZLR 155 (S) at 160B.

This ground is a modification of the common law position where an employee impliedly undertakes to perform his or her duties with normal skill and diligence.¹⁰⁷ This ground is not available for mere breach of the common law duty of the employee. The employee must have expressly or impliedly professed a particular skill. This arises from the word ‘held’: the employee must have ‘held’ himself or herself to possess the particular skill in question.¹⁰⁸ This lack of skill can only be established by showing that the employee failed to ‘exercise’ the skill, and in this regard ‘possess’ includes ‘exercise’.¹⁰⁹ Even a single isolated act can constitute evidence of lack of skill.¹¹⁰ The test for the standard of skill expected is that of a reasonably skilled person in the trade or profession.¹¹¹ Holding out is making a promise or representation.¹¹² An express promise or representation is not necessary where the nature of the work necessarily requires a particular skill, such as being employed as a lawyer or accountant or driver. In *Total Zimbabwe (Pvt) Ltd v Moyana*¹¹³ the employee signed a contract of employment where the job description was specialized and his attention had been drawn to that description. It was held that, by implication, the employee had undertaken to exercise reasonable skill in the performance of the work in question. In other words, he had by implication ‘held’ himself out to possess the requisite skill.

107 See Chapter 4.

108 *Quest Motor Corporation (Pvt) Ltd v Nyamakura* 2000 (2) ZLR 84 (H); *Total Zimbabwe (Pvt) Ltd v Moyana* 2005 (1) ZLR 65 (S).

109 *Toyota Zimbabwe (Pvt) Ltd v Moyana* 2005 (1) ZLR 65 (S); *Lister v Romford Ice & Cold Storage Co.* [1957] AC 555 at 572-73.

110 *TM Supermarkets v Weston Muchetu* SC 123/2004.

111 *Lister v Romford Ice and Cold Storage Co.* [1957] AC 555.

112 *Ibid.*

113 *Supra.*

TERMINATION OF EMPLOYMENT

(III). TERMINATION UNDER CODE OF CONDUCT

Introduction

One of the far-reaching changes made to Zimbabwe's labour law system as a direct result of the 1990 economic structural adjustment programme (ESAP) was the introduction of workplace codes of conduct. Before 1990, termination of employment under the then Labour Relations Act was almost exclusively governed by Ministerial regulations promulgated in 1985.¹ In terms of those regulations, dismissal on notice was abolished and, save for cases where the employee consented to termination, no employment could be terminated without Ministerial approval.² However, summary suspension for certain forms of misconduct was permitted pending an application to a labour relations officer for dismissal. In 1990, this rigid protection was relaxed in the name of labour market flexibility. This relaxation came in the form of workplace codes of conduct. An undertaking or industry with a registered code of conduct was exempted from the operation of SI/371/85.³ This position, initially a matter covered only by Ministerial regulations, was eventu-

1 Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations, SI 371/85.

2 Section 2 of SI 371/85.

3 Section 1A of SI 375 which was inserted by section 2 of SI/377/90.

ally incorporated into the Act itself in 1992.⁴ The main significance of a registered code of conduct is that in terms of section 12B(2), a dismissal is automatically unfair if the employer fails to show that the dismissal was in terms of the registered code of conduct.

The various legal aspects of registered codes of conduct are discussed below.

Registration of code of conduct

There are only two types of codes of conduct: an employment council code of conduct and a works council code of conduct. A code of conduct may only be registered at the instance of either an employment council or a works council.⁵ Where an employment council has already registered a code in respect of any industry, undertaking or workplace represented by it, no works council may apply for the registration of a code in respect of the industry, undertaking or workplace represented by the employment council without the proposed code being approved by the employment council.⁶ Without the approval of the employment council, any purported code of conduct registered by the works council when there is in existence a code registered by the employment council is void. If the works council is the first to register a code of conduct and the employment council subsequently registers its own code, the latter will supersede that of the works council, notwithstanding the works council having been the first to register.⁷ The use of the word ‘supersede’ is significant: the subsequent employment council code makes void or nullifies the works council code. A works council faced with a subsequent employment council code registered after its own code has no option but to seek approval of its pre-existing code, otherwise its code is nullified by operation of law notwithstanding being registered.

Thus the two situations in which a code of conduct registered by a works council is valid are where (i) there is no registered employment council code at all and (ii) the code is approved by the employment council, if there is a registered employment council code, whether registered prior or subsequent to the works council code. If an employment council

4 Labour Relations Amendment Act, 1992, section 25. The section in the Labour Act is 101.

5 Section 101 (1).

6 Section 101 (1a).

7 Section 101(1b).

refuses to approve a code made by a works council, the latter may refer the matter to a labour officer, whose determination is final unless the parties agree to refer it to voluntary arbitration.⁸

The Registrar is not given any discretion to accept or decline registration of a code of conduct. If the proposed code provides for the matters specified in the Act, it must be registered.⁹ It is the Registrar who determines whether or not the proposed code provides for the matters specified in the Act and that determination must be based on objective facts.¹⁰

Registration of a code is not conclusive evidence of the code's compliance with the Act. If the Registrar registers a code which does not comply with the requirements of section 101(3), his or her decision may be challenged on review in the Labour Court in terms of section 89(1) (d1) or in the High Court and the registration of the code may be set aside. The ground for review is illegality. Alternatively, the code may be declared void on an application to the High court for a *declaratur*.

A code of conduct must be registered in terms of the Act for proceedings under it to be valid.¹¹ In other words, proceedings in terms of an unregistered code of conduct are a nullity.¹²

Where an employee is charged under, and disciplinary proceedings held in terms of, an unregistered code, the proceedings are not only a nullity but the court or arbitrator is also entitled to raise this point *mero motu*.¹³ If an unregistered code provides for certain procedures, these become irrelevant should the employer invoke and duly comply with the Model Code.¹⁴

However, an unregistered code of conduct does not appear to be wholly irrelevant. It was held *obiter* in *Makuwaza v NRZ*¹⁵ that where, in respect of a given offence which qualifies as serious misconduct under the Model Code, an unregistered code provides a specific punishment short of dismissal, an employee may raise it as a defence to a penalty of dismissal if he or she is tried for that offence under the Model

8 Section 101 (1c).

9 Section 101 (2).

10 Ibid.

11 *Zimbabwe Newspapers (1980) Ltd v Ndlovu* 2000 (1) ZLR 127 (S).

12 Ibid.

13 Ibid.

14 *Phineas Matoi v Zimbabwe Iron & Steel Co. Ltd.* SC 231/1993.

15 1997 (2) ZLR 453 (S).

Code. The basis for this is that an employer with an unregistered code of conduct that provides for a penalty less than dismissal, cannot be taken to have proved the grounds for dismissal under the Model Code. These *obiter* remarks were followed in *Colcom Foods Ltd v Felix Chatira*.¹⁶ The position was further confirmed *obiter* in *Matungamire v Posts and Telecommunications Corporation*.¹⁷ An argument which may be pursued in support of this approach is to say that the Model Code exists for the benefit of employees, so that where an employee stands to benefit under the contract of employment, the Model Code cannot be used to undermine that benefit. It may also be argued that as the penalty of dismissal is a matter of discretion, the employer may be taken to have waived its right to dismiss for that particular form of misconduct. The problem with this is that it will make unregistered codes effective and this is contrary to the legislative intent. Further, the cases cited dealt with the old law where the employer was required to seek approval for a termination. The better view seems to be that of regarding an unregistered code as a nullity.

The registered code of conduct vis-à-vis other proceedings

The existence of a registered code of conduct makes it unlawful to terminate employment in terms of the Model Code.¹⁸ This is because the Model Code can only be invoked where there is no registered code of conduct. A clause in a contract of employment which gives the employer the option to use either the Model Code or its registered code of conduct is invalid.¹⁹ Garwe JA made this clear in *Chikomba Rural District Council v Pasipanodya*²⁰ as follows:

There can be no doubt, regard being had to the provisions in the Act and the Regulations ... that the submission by the appellant that it was entitled to use either the Act or the Regulations or both is not tenable...

Since it is common cause that the appellant does have a registered code of conduct, the termination of a contract of employment of any of its employees had to be in terms of its code of conduct and not the National Employment Code of

¹⁶ SC 135/2000.

¹⁷ 2002 (2) ZLR 462 (S).

¹⁸ *Chikomba Rural District Council v Pasipanodya* 2012 (1) ZLR 577 (S).

¹⁹ *Ibid.*

²⁰ 2012 (1) ZLR 577 (S).

*Conduct. The appellant therefore erred in terminating the respondent's employment in terms of the National Employment Code of Conduct. The submission that the appellant was entitled to use the National Employment Code of Conduct because the parties had agreed that the code could be used is equally without merit. Clearly, any agreement entered into between the parties had to comply with the specific provisions of both the Act and the Regulations. Any agreement to the contrary would be against the law and a termination of employment based on such agreement would be null and void. That statutory provisions override the common law goes without saying.*²¹

In terms of section 101(5) of the Labour Act, a labour officer shall not intervene in any dispute or matter which is or is liable to be the subject of proceedings under a registered code. This means that in such circumstances, the labour officer has no jurisdiction to resolve the matter. However, if a matter is nevertheless referred to a labour officer and the other party chooses not to challenge this jurisdiction but proceeds into the merits of the complaint, that party may be taken to have submitted to the jurisdiction of the labour officer and to have waived the right to have the dispute resolved in accordance with the registered code of conduct.²²

In terms of section 101(6) of the Labour Act, an employee or employer may refer the matter to a labour officer if the matter is not determined within 30 days.²³ It has been held that subsections (5) and (6) of section 101 do not preclude reference of the matter to a labour officer before the expiry of the 30 days in a case in which the parties are agreed either that the dispute is incapable of resolution under the code or that it is more advantageous to have it dealt with by the labour officer.²⁴ The expiry of the 30 days does not automatically render further proceedings under a code unlawful. Section 101(6) is not mandatory, as the word used is 'may' and not 'shall'. It merely entitles either party to refer the matter to a labour officer, failing which any further proceedings under the code

21 At p. 580C-E.

22 *Chubb Union Zimbabwe (Private) Limited v Chubb Union Workers Committee* SC 1/2001.

23 *Mashonganyika v Lena NO & Anor* 2001 (2) ZLR 103 (H).

24 *Mwenye v Lonhro Zimbabwe Ltd* 1999 (2) ZLR 429 (S).

remain valid.²⁵ Besides referring the matter to a labour officer on the expiry of the 30 days, the employee is also entitled to bring a High Court application for a *mandamus* compelling the employer to have the matter resolved in terms of the code.²⁶

The 30-day period does not refer to the time within which a valid determination must be made. In other words, the provision does not say the determination should be made within the period. This means that a determination made after the 30-day period is valid.²⁷ If a determination is made after the 30-day period before reference of the matter, the right to refer the matter to a labour officer automatically lapses.²⁸ There is no room for the referral of a matter which has already been determined, even where the determination is made more than 30 days after the matter arose.²⁹ To be ‘determined’ means that both the finding of guilty and the penalty must be concluded. Where the finding of guilty was within thirty days but the penalty was not imposed because the committee could not agree on the appropriate sentence, the matter was not determined and reference to a labour officer was appropriate.³⁰

The existence of a registered code of conduct does not preclude an employer from suspending an employee with pay, outside the framework of the code, in order to facilitate investigations.³¹ Nor is an employer obliged to follow the code where an order of court directs a different process. This is illustrated by the facts of the case of *ZESA v Maposa*.³² In that case, Maposa, an employee of ZESA, received an internal memorandum suspending him with pay pending an investigation into his conduct. After the investigations, and while still on suspension with pay, he received a letter advising him that the ZESA Board of Directors was of the opinion that he had committed very serious acts of misconduct but was being offered an opportunity to resign from employment. Maposa refused to resign, whereupon he received a letter suspending him without pay pending a disciplinary hearing in terms of the code of conduct.

25 *Robson Marimo v National Breweries* SC 125/2000.

26 *Ibid.*

27 *Watyoka v ZUPCO (Northern Division)* 2006 (2) ZLR 170 (S).

28 *Ibid.*

29 *Ibid.*

30 *Nixon Ramani v NSSA* SC 38/2003

31 *ZESA v Maposa* 1999 (2) ZLR 452 (S).

32 1992 (2) ZLR 452 (S).

In terms of the code of conduct, ZESA was obliged to refer the matter to the secretary of the disciplinary committee within ten working days after the suspension. But before the expiry of the ten working days, Maposa instituted proceedings in the High Court seeking an order that;

- (i) ZESA's Board of Directors or any of its organs be not entitled to play a role in the termination of his employment; and
- (ii) an independent arbitrator be appointed by the parties to hear the dispute.

This order was eventually granted by the High Court with the consent of both parties. When the arbitrator ruled the suspension of Maposa to be a nullity owing to ZESA's failure to comply with the provisions of the code on referring the matter to the disciplinary committee within ten days, the Supreme Court disagreed, holding that it was the High Court application which made it impossible for ZESA to comply with the code.

What is the status of a code of conduct when a business has been transferred?

It has been held that where there is a sale or transfer of a business, section 16 of the Labour Act does not operate to transfer an employment code of conduct to the new employer, notwithstanding the fact that employees are deemed to be transferred on terms and conditions which are not less favourable.³³ The justification given for this interpretation is that it 'would be anomalous to hold that a group of employees who are absorbed by another undertaking would continue to be bound by the code of conduct registered in respect of their former employer, whilst the rest of the employees would be bound by a different code of conduct'.³⁴

Interpretation of code of conduct

In *Coh Coh Enterprises (Pvt) Ltd v Mativenga & Anor*³⁵ McNally JA said, *obiter*:

We must bear in mind that codes of conduct, being often drafted by laymen, should not be over-strictly interpreted.

This appears to be one of the key considerations which the courts, sub

³³ *Chinowaita & Anor v Air Zimbabwe (Pvt) Ltd* 2003 (1) ZLR 402 (H).

³⁴ Per Smith J, p. 406C-D.

³⁵ 2001 (1) ZLR 151 (S) at 152D.

silentio, have taken into account in the interpretation of codes of conduct. Be that as it may, there appears to be a clear approach, namely that in interpreting a code the golden rule must be applied and words given their ordinary grammatical meaning except where to do so leads to an absurdity so glaring that it could never have been the intention of the framers.³⁶ The case of *Madoda v Tanganda Tea* illustrates the difficulty inherent in the golden rule, namely: when does an interpretation meet the requisite ‘absurdity’ standard? In that case, the Tanganda Tea Company employment code provided in Section 7 that the disciplinary committee was to be composed inter alia of a chairman, two workers’ committee members and the worker concerned (the alleged offender).

Sandura JA easily held it to be a glaring absurdity to make the alleged offender a member of the disciplinary committee and so interpreted the provision to mean that the alleged offender was one of the persons expected to be present at the hearing. However, a difficulty arose with the two workers’ committee representatives. As the matter involved a managerial employee, the learned judge in the court *a quo* had held it to be an absurdity to insist on the two workers’ representatives being members of the disciplinary committee in a matter involving a manager and so interpreted the code to mean that their presence was not a requirement in such cases. The Supreme Court disagreed. Sandura JA held that while it may be undesirable, it was not such an absurdity warranting departure from the grammatical meaning and thus came to the conclusion that their absence was fatal. In his own words:

*Although the prospect of the two members of the workers’ committee sitting in judgment over a managerial employee might be inappropriate or undesirable, it could hardly be described as an absurdity which warranted modification of the grammatical and ordinary sense of the words used.*³⁷

Further, in the interpretation of a code, it must be borne in mind that a code is meant to be ‘definitive and exhaustive’.³⁸ Thus in *Delta Corporation Ltd v Paul Gwashu*³⁹ the code provided that an offence was aggravated if ‘it is based on race, colour, religion, sex, political opinion,

36 *Madoda v Tanganda Tea Co. Ltd* 1999 (1) ZLR 374 (SC).

37 At p. 377E.

38 *Delta Corporation Ltd v Paul Gwashu* SC 96/2000.

39 SC 96/2000.

creed, tribe or place of origin.’ The employer sought to argue that that provision did not limit aggravating circumstances to those specifically enumerated. This argument was rejected on the basis that the purpose of a code of conduct was to create certainty, and whenever it enumerates circumstances the list should be regarded as exhaustive.

The conception that employment codes of conduct are ‘drafted by laymen with little or no knowledge of law’ has been relied upon to exclude some principles of statutory interpretation.

In *Murawo v GMB*⁴⁰ it was held that the *eiusdem generis* rule, a well-known maxim of statutory interpretation, did not apply to the interpretation of codes of conduct. Murawo was charged with, and found guilty of, the offence of ‘activities inconsistent with the express or implied condition of his contract of employment’. In the code, this offence appeared in section 5, which read as follows:

Incitement, intimidation, indulging in disorderly behaviour or activities inconsistent with the express or implied conditions of his contract of employment.

It was argued on behalf of Murawo that the activities inconsistent with the express or implied conditions of an employee’s contract of employment envisaged in section 5 must, in line with the *eiusdem generis* rule, be activities in the same genus or class as incitement, intimidation and indulging in disorderly behaviour. This argument was rejected by the Supreme Court on two grounds. The first was that the *eiusdem generis* rule did not apply to the interpretation of employment codes of conduct because ‘in general, employment codes of conduct are not drafted with the same expertise and precision required for the drafting of statutes.’⁴¹ The second was an alternative ground. It was that even if the *eiusdem generis* rule applied to the interpretation of employment codes of conduct, it had no application in that case because it would have produced an absurdity, as more serious activities not in the same genus would not be acts of misconduct.

In *Circle Trucking v Mika Mahachi*⁴² the respondent was employed as a driver. There was a standing instruction that drivers were not allowed to carry unauthorized passengers. The respondent was accused of carrying unauthorized passengers. He was charged with ‘corruption’, which is an

40 2009 (1) ZLR 304 (S).

41 At p. 310B.

42 SC 4/2007.

offence in the code of conduct. However, ‘corruption’ is not defined. The Supreme Court said the word had to be given its ordinary, grammatical meaning and not its sense in the criminal context. It referred to the Concise Oxford Dictionary which defined ‘corruption’ as ‘decomposition; moral deterioration, use of corrupt practice (bribery etc.) perversion (of language, text, etc) from its original state, deformation...’ It adopted this meaning and held that a driver who, without the authority of his employer, carried passengers and goods in return for a fee was corrupt for purposes of the code of conduct.

In *Lever Brothers (Pvt) Ltd v Elisha Pfumo*⁴³ the code of conduct provided for dismissal as a penalty where the employee’s negligence caused ‘loss of an extensive nature’. It was held that ‘loss of an extensive nature’ referred to actual loss and not potential loss.

In cases where it is clear that the code is badly drafted and as a result some serious offences are incorrectly defined, the courts will treat the definitions as not exhaustive and adopt a meaning which ensures that employees who commit serious offences do not escape on technicalities. This was the approach taken in *Malimanji v CABS*⁴⁴ where a bank teller who had acted dishonestly by creating a shortfall was charged with ‘unsatisfactory work performance’ because the code did not have a specific offence for what he had done. It was held that the charge of ‘unsatisfactory work performance’ was a proper charge in the circumstances. It was interpreted to cover dishonesty. This approach was justified on the basis that drafters of codes were ‘not schooled in the law’.⁴⁵

Codes and Managerial Employees

Does a code apply to managerial employees?

As most codes are registered on the application of a works council whose worker members are derived from a non-managerial workers’ committee, an issue may arise as to whether such a code applies to managerial employees given that they are not represented in the works council. This is not an issue at all if the code specifically says it applies to ‘all employees including managerial employees’. In such a situation it will apply to managerial employees, even where the code was registered by

43 SC 37/2003.

44 2007 (2) ZLR 77 (S).

45 At p. 79C.

a works council whose membership is of non-managerial employees.⁴⁶ Similarly, where the code states that it does not apply to 'managerial employees' it cannot be applied to them.⁴⁷

Problems arise where the code merely refers to 'employees'. It is a matter of interpretation whether or not managerial employees are covered by the word 'employee'. In *Zimbabwe Tourist Investment Co. v Ernest Gwinyai*⁴⁸ the code provided as follows:

This code of conduct is a guideline of rules and procedures intended to promote disciplined work behaviour. It outlines the standards of conduct and discipline expected of all employees and management of the Zimbabwe Tourism Investment Company.

The Labour Relations Tribunal had reasoned that the distinction in the preamble between 'employees' on the one hand and 'management' on the other meant that managerial employees were not 'employees' under the code. It also considered the disciplinary structure which had four levels and noted that the group finance manager could not be tried by the first three levels which were presided over by his juniors. It took this as further evidence that the code was not intended to cover managerial employees. The Supreme Court disagreed. McNally JA, who delivered the unanimous judgment, boldly stated that notwithstanding the absence of an express reference in the code to 'managerial employees' it was 'utterly clear' that the term 'employee' in the code had the same meaning as that in the Labour Act, where it included managerial employees. He refused to attach any significance to the disciplinary structure, saying:

*One has to interpret the appeal structure sensibly. Clearly, a very senior managerial employee would not enter the appeal structure at level a or level b, or even level c. He would enter it at level d.*⁴⁹

This approach necessarily involved turning an appellate level of the disciplinary structure into a hearing level of first instance, an outcome which is unlikely to have been intended. First, there is nothing in the

46 *Medical Investments Ltd t/a Avenues Clinic v Florence Chingwena* SC 2/2012. See also generally *Madoda v Tanganda Tea Co.* 1999 (1) ZLR 374 (S).

47 *Almin Metal Industries Ltd v Hardon Chinowaita* SC 8/2003.

48 SC 150/1995.

49 At p. 4.

code to compel the view that the word ‘employee’ was intended to bear the meaning ascribed to it in the Labour Act. Similarly, there is nothing in the Labour Act to suggest that a registered code of conduct could not restrict the scope of its operation to non-managerial employees only. The structure of the disciplinary system with three out of four levels being inapplicable to certain categories of managerial employees seem to suggest that the code had not been intended to apply to managerial employees. Secondly, the Supreme Court appears to have overlooked the context in which codes of conduct are registered. A works council is defined in the Act as ‘a council composed of equal numbers of employer representatives and employee representatives who are members of a workers’ committee’.⁵⁰ The Act prohibits managerial employees from belonging to the same workers’ committee as non-managerial employees.⁵¹ The argument that the Legislature could not have intended that a code of conduct concluded in a works council to which managerial employees were not represented could bind the latter and *vice versa* did not arise.

In *Samuriwo v ZUPCO*⁵² an issue arose as to whether or not the managing director was covered by the code of conduct. The code itself had the following provision: ‘This code of conduct shall apply to all employees regardless of rank who fall under Zimbabwe United Passenger Company...’ Garwe J held that the managing director was an ‘employee’ within the meaning of that term in the code and therefore fell to be dealt with in terms of the code. The code itself made no provision for the managing director being subject to disciplinary proceedings. The court avoided this difficulty by saying that it was irrelevant since termination in that case was not in terms of the code but under the contract of employment. In the Supreme Court, this position was reversed.⁵³ The Supreme Court held that although a managing director may be an ‘employee’ of the company, this did not necessarily mean that the code of conduct applied to him. In the particular code, there were no provisions dealing with disciplinary proceedings against the managing director. On the contrary, the managing director actually played an important role in the disciplinary process. For example, he was the chairperson of the Head Office Appeals Committee and his decision was final, subject only to appeals to the Labour

50 Section 2 of the Act.

51 Section 23(1) of the Act.

52 1999 (1) ZLR 385 (H).

53 2000 (1) ZLR 647 (S).

Relations Tribunal (now the Labour Court). There was no provision as to who would chair the Appeals Committee as an alternate to the managing director and as to who else could make a final decision before an appeal to the Labour Relations Tribunal. The Supreme Court thus came to the conclusion that the intention must have been to exclude the managing director from the code of conduct.

Filling gaps in procedures in a code to accommodate managerial employees

Where a code applies to managerial employees, it is common for there to be gaps in the specific procedures to be followed when disciplining a senior manager. The code is usually elaborate on procedures for less senior employees. For example, the code may provide that at the first level a disciplinary hearing shall be chaired by the head of department but fail to provide for what would happen in the event that the head of department himself or herself is facing disciplinary action. The law is that where such a gap exists, the employer is allowed to be innovative and adapt the existing procedures in such a way as to provide a sensible, fair and just procedure.⁵⁴ In *Dulys Holdings v Chanaiwa*,⁵⁵ Chanaiwa was a branch manager. The code of conduct did not have a specific procedure for the situation where a branch manager was charged. The managing director chaired the disciplinary committee at the first level. The disciplinary committee unanimously found Chanaiwa guilty and dismissed him. An appeal, in terms of the code, lay to the managing director. The managing director did not hear the appeal but set up a committee, which heard the appeal. The committee was chaired by the finance director and had representatives of both management and employees. Chanaiwa lost the appeal. He appealed to the Labour Court, which upheld his appeal on the basis that the disciplinary proceedings were not in compliance with the code. The employer appealed to the Supreme Court and succeeded. The Supreme Court held that the procedure followed was not irregular because the code, while clear that it applied to senior managers, did not set out a specific procedure for a senior manager. The procedure chosen accorded justice to the offending employee in that he (i) was charged with an offence provided for in the code, (ii) was given an opportunity to answer to the charge, (iii) appeared before a disciplinary committee,

⁵⁴ *Dulys Holdings v Chanaiwa* 2007 (2) ZLR 1 (S).

⁵⁵ *Ibid.*

(iv) was permitted to file an appeal, and (v) appeared before an appeal committee.

It is submitted that the approach in the *Dulys Holdings* case (*supra*) must be restricted to cases involving senior managerial employees covered by the code but without specific procedures outlined for them. In all other situations, compliance with specified procedures is mandatory.

Is the list of offences in a code exhaustive?

The list of offences in a code is exhaustive in the sense that, to charge an employee with an offence in terms of the code, there must be reference to a specific provision of the code. To constitute misconduct, there must be breach of a named provision of the code. However, once a specific provision is identified, it is a matter of interpretation whether or not that provision is exhaustive or is merely giving examples. An example of where a provision of the code was held to be ‘definitive and exhaustive’ is *Delta Corporation Ltd v Paul Gwashu*.⁵⁶ Gwashu was employed by Delta. His duties included serving sadza to customers at the food section of the shop where he was working. A dispute arose between him and three customers over the number of plates he had to serve them. Tempers flared and it was alleged in the ensuing altercation that Gwashu insulted the three customers by saying that their stomachs were too big and that he would put rat poison or pills in their food if they persisted with their demand. Gwashu was charged with use of abusive language in contravention of the code of conduct. He was found guilty and dismissed. The Labour Relations Tribunal held that the conviction was correct but set aside the dismissal penalty on the basis that the offence had not been committed in ‘aggravating circumstances’ as defined in the code. The offence was defined as ‘the uttering of any word or any publication or any statement expressing or showing hatred, ridicule or contempt for any person or group of persons’. The code added: ‘the offence is aggravated when it is based on race, colour, religion, sex, political opinion, creed, tribe or place of origin’. None of the listed aggravating features were applicable to Gwashu. The employer argued that the list of aggravating features was not exhaustive. This was rejected by the Supreme Court, which held that codes of conduct are meant to be ‘definitive and exhaustive’. It dismissed the employer’s appeal.

On the other hand, in *Marvo Stationery Manufacturing (Pvt) Ltd v*

56 SC 96/2000.

*Jokwani & Ors*⁵⁷ the code provided as follows:

Discharge is the final sanction and should be used:

- (a) ...
- (b) ...
- (c) when the offence committed is of so serious a nature that it amounts to a breach of, or repudiation of, his contractual obligations such as –
 - (i) wilful and unlawful breach of company safety...
 - (ii) absence from work for five or more consecutive working days without prior approval or an unacceptable reason for such absence.
 - (iii) wilful and unlawful damage to plant or company property through negligence...

The employees were charged with gambling at work during working hours, it being alleged to be a breach of paragraph (c) above. The Supreme Court held that the fact that gambling was not specifically mentioned did not mean that it did not constitute an offence because the provision was not exhaustive. What was listed were mere examples. Any other breach of a serious nature was covered. On the facts, however, the gambling, being a one-off occurrence, was held not covered.

Internal appeals in codes of conduct

Codes of conduct provide an internal appeal structure. An appeal body must act in accordance with the provisions of the code, failing which its decision may be rendered a nullity. An issue of great significance is: what are the powers of the appeal body? The Supreme Court has held that, in the absence of any provisions to the contrary in the code of conduct, an appeal body has three options: allow an appeal, dismiss an appeal or remit the matter for a re-hearing.⁵⁸ Where the framers of the code do not wish the appeal body to have any of these three options, they must specifically say so in the code. This is because the three options are inherent powers of an appeal body.

It is submitted, however, that the power to remit for a re-hearing may also be taken away by the nature of the structures in the code which

⁵⁷ 2005 (2) ZLR 261 (S).

⁵⁸ *Mackenzie v Rio Tinto Zimbabwe* 2005 (1) ZLR 462 (S).

may make it impracticable to conduct a re-hearing. In *Mnensa & Anor v Chingwena NO & Anor*⁵⁹ the employees were found guilty of misconduct by the employer's disciplinary committee. They appealed to the chief executive officer in terms of the code of conduct. The chief executive officer set aside the committee's decision on the procedural ground that there were breaches of the *audi alteram partem* principle. He remitted the matter for a fresh hearing. The employees took the matter to the High Court seeking a declaration that once the decision of a disciplinary committee had been set aside on appeal, the *status quo ante* applied, they remained employees and were entitled to reinstatement. They also argued that the chief executive officer had no jurisdiction to order a fresh hearing. The employees were granted the orders sought; they remained employees and were entitled to their salaries. The court held that the chief executive officer had no power, in terms of the code, to remit a case for a fresh hearing. The main basis for this was that there was no provision to that effect in the code. This is no longer the law in the light of *Mackenzie v Rio Tinto Zimbabwe (supra)* which held that there is an inherent power to remit unless expressly taken away. However, there was a second basis, which remains good law. The code had no provision for an alternate chairperson of the disciplinary committee. In the first hearing, it was the chairperson who exercised his casting vote to find the employees guilty. While other members of the disciplinary committee could be substituted, there was no room for another chairperson as the code was specific about the chair. The chairperson had already decided on the guilt of the employees in the first hearing and could hardly be considered to be impartial in a fresh hearing.

It is submitted that where the provisions of a code make it impracticable to have an impartial and fair re-hearing, there is no power to order a re-hearing. The appeal body is then left with two options: either allow the appeal or dismiss it.

For there to be an impartial and fair re-hearing, the disciplinary committee must be composed of different persons. After setting aside the proceedings in *MMCZ v Mazvimavi*,⁶⁰ Gubbay CJ held as follows:

I would add, however, that if there is to be another hearing by the disciplinary committee into allegations of miscon-

59 2002 (2) ZLR 475 (H).

60 1995 (2) ZLR 353 (S) at 364A.

duct, members on the management side, as well as those from the workers' committee, must be different from those who previously comprised the disciplinary committee.

What of appeals noted out of time? If there is no provision in the code empowering the appeal body to condone the late noting of an appeal, an appeal noted out of time is a nullity.⁶¹ Consequently, such an appeal body has no jurisdiction to hear an appeal noted out of time. The failure to note an appeal in time extinguishes the right of appeal and makes the decision of the body *a quo* the final determination made in terms of the code of conduct.

Where there is more than one internal appeal structure, an issue may arise in cases where the proceedings of the second appeal structure are set aside. What is the consequence of setting aside those proceedings? The parties revert to the position they occupied before the second appeal. Take the case of an employee who is dismissed by a hearing officer and appeals to the works council. He loses the appeal and makes a further one to the National Employment Council. He loses again and appeals to the Labour Court. If the Labour Court sets aside the decision of the National Employment Council on the basis of a procedural irregularity and remits the matter for a re-hearing, the employee remains dismissed: he stands in the position of an employee who has lost his first appeal and is waiting for his second appeal.⁶²

May an appeal body increase the penalty, say from a warning to a dismissal? It depends on whether the code of conduct has a provision for a counter-appeal. In the absence of a counter-appeal, it is improper for an appeal body to increase a penalty. Where there is a provision for a counter-appeal, a penalty may be increased if:

- (i) there is a counter-appeal against the penalty,
- (ii) the appeal body gives the employee adequate scope to make representations specifically addressing the issue of penalty, and
- (iii) the penalty imposed *a quo* is grossly disproportionate to the offence.⁶³

61 *Barclays Bank of Zimbabwe Ltd v Fortune Ncube* SC 26/2009.

62 *JIT Industries (Pvt) Ltd v Ian Sibanda* SC 101/2000; *Standard Chartered Bank of Zimbabwe Ltd v Chikomwe & Ors* SC 77/2000.

63 See *obiter* remarks in *Small Enterprises Development Corp. v David Chemhere* SC 23/2002 at pp. 2,4

Is the offence work-related?

The general rule is that an employee's act of misconduct must be work-related for the employer to have jurisdiction to institute disciplinary proceedings.⁶⁴ Accordingly, codes of conduct only apply to work-related acts of misconduct. The issue is: when is an offence work-related if it takes place outside the workplace. The law is that conduct taking place outside the workplace is work-related if it is closely connected with the employer-employee relationship or has or is likely to have adverse effects on the employer.⁶⁵ In *Makwiro Platinum Mines v Paradzayi*,⁶⁶ Paradzayi and fellow employees were living in a compound erected by the employer for the accommodation of employees who were on duty at the mines. One night at about 8.40 p.m., he stormed into the canteen in a drunken state and, shouting at the top of his voice, used abusive language to the compound manager and a fellow employee. He also threatened to ill-treat the son of the compound manager who was his subordinate at work. He went to the television lounge where fellow employees were watching the news and continued to shout at the top of his voice. His unruly conduct made it impossible for other employees to sleep. It was only at 11 p.m. that he was removed from the compound and taken to his home. The Supreme Court held the conduct to have been work-related. It considered the following factors in reaching that conclusion: (i) the employee was on duty that weekend, that is why he was booked in at the compound, (ii) his undisciplined behavior created a stressful atmosphere which made it impossible for other employees to sleep, thus adversely affecting the services they were to render to the employer, and (iii) he threatened to ill-treat his subordinate and this had adverse effects on the subordinate and his work to the employer.

In *Zimpak (Pvt) Ltd v Mugarabi*,⁶⁷ Mugarabi was the chairman of the workers' committee. He complained of favouritism accorded to female employees by the telephonist regarding the use of the telephone at the workplace. Two female employees insulted him in response to his complaints. He threatened to beat them up after working hours so that the employer would not intervene. True to his word, immediately after work

64 *Zimpak (Pvt) Ltd v Mugarabi* SC 196/1994.

65 *Makwiro Platinum Mines v Paradzayi* 2004 (2) ZLR 184 (S).

66 *Ibid.*

67 SC 196/1994.

and outside the work premises he came upon the two women, shook them and threatened to assault one of them. The Supreme Court held this to be work-related as it was closely connected with the employer-employee relationship. i.e. it had its origins inside the workplace and the conduct was towards fellow employees.

The test for whether conduct outside the workplace is work-related is that of a fair-minded person. It is a question of degree: the degree of connection with the employer-employee relationship or the extent of the adverse effects on the employer must be such that a fair-minded person applying his or her mind to the facts would say it is just and proper that the conduct be regarded as work-related. In *Chinowaita & Anor v Air Zimbabwe (Pvt) Ltd*⁶⁸ the employees, while on leave from their employment, flew to Mauritius for a wedding. Their baggage was found to contain excess cigarettes. They were charged with misconduct, the alleged offence being acting in a manner likely to bring the employer into disrepute. According to the code of conduct, 'smuggling goods whilst on duty' was an act of misconduct. As they were not on duty, this act of smuggling could not have been an act of misconduct. To constitute an act of misconduct, the court insisted that there was supposed to be a separate finding that the smuggling was likely to 'bring scorn or disrepute' upon the employer. This had not been done and the findings of guilty were set aside.

Depending on the wording of the code, the issue of 'work-related' offences may also arise for acts within the workplace. A good illustration is *Tanganda Tea Co. Ltd v Andrew Mvududu*.⁶⁹ The employee was a garage foreman. He assaulted a person who was not an employee in a cocktail bar on the employer's premises. The person assaulted was a foreign national who had come to the cocktail bar for entertainment. Following this incident, the employee was charged with, and found guilty of, an offence under the code of conduct. He was dismissed. The Labour Court set aside the dismissal on the basis that the offence was not work-related. It was of the view that what was prohibited was violence against employees or other persons who had business with the employer. The employer appealed to the Supreme Court and succeeded. The code prohibited 'fighting/violence at the workplace'. It also prohibited 'disorderly behaviour and related breaches'. The issue to be determined was whether or not the fighting or violence envisaged in the code were restricted in the sense

68 2003 (1) ZLR 402 (H).

69 SC 1/2007.

suggested by the Labour Court. The Supreme Court interpreted the code to be prohibiting fighting with anyone, including strangers, on company premises. It allowed the appeal and the employee was dismissed.

Where there is a delay in finalizing the employee's appeal, that is not a basis for reinstatement or termination of his or her suspension. Delay alone does not entitle an employee to reinstatement. The remedy is to apply for a *mandamus* in the High Court.⁷⁰

The other option may be to appeal to the Labour Court to consider the matter on the merits, using the last decision as a determination for the purposes of section 92D.⁷¹

The right to a fair hearing

Proceedings under a code of conduct must be conducted in accordance with the tenets of the fundamental right to a fair hearing. Any infringement of any of the tenets renders the proceedings a nullity. The most important tenets of a fair hearing are the following principles: of natural justice; *nemo iudex* (no person can be judge in their own cause); and *audi alteram partem* (hear the other side). The fact that proceedings under a code of conduct are intended to be flexible and informal does not mean that the right to a fair hearing may be dispensed with. In *Sable Chemical Industries Ltd v Easterbrook*⁷² Garwe JA stressed this point as follows:

It is true that proceedings before disciplinary hearing committees established under a code of conduct are intended to be flexible and less formal than proceedings in a court of law. Various decisions of the High Court and Supreme Court in this jurisdiction have stressed the need for flexibility in these circumstances. Those same decisions have also stressed the need for a fair hearing and in particular for the audi alteram partem rule to be observed. It is not part of our law that tribunals can, under the guise of flexibility, violate principles of fairness and do so with impunity.

In addition to the factors already discussed in relation to the disciplinary process under the Model Code,⁷³ the following are some of the

70 *PTC v Zvenyika Chizema SC 108/2004; Nyoni v Secretary for Public Service Labour & Social Welfare & Anor 1997 (2) ZLR 516 (H) at 522G-523A.*

71 *PTC v Zvenyika Chizema (supra).*

72 2010 (1) ZLR 342 (S) at 348 E.

73 Chapter 6.

issues intricately associated with the right to a fair hearing in proceedings under a code of conduct.

Is an oral hearing mandatory?

Unless the employee specifically waives the right to an oral hearing, it would appear that a fair hearing necessarily includes an oral hearing.

The High Court held, in *Machiya v BP Shell Marketing Service (Pvt) Ltd*⁷⁴ that a code of conduct creates a relationship between the employer and the employee which is of a sufficiently public character to be said to have an administrative law element. It held accordingly that it was a requirement that an oral hearing be held.

May a code provide for dismissal without a hearing?

Such a code would be *ultra vires* the Labour Act. In *Design Incorporated (Pvt) Ltd v Innocent Chapangura and Eighty-eight Others*⁷⁵ the employer dismissed 89 employees who had participated in a strike. They were all dismissed summarily. The employer justified summary dismissal on the basis that the code of conduct provided, as a penalty, what was termed 'instant dismissal' for the acts committed by the employees.

The relevant portion of the code read:

The following offences entail instant dismissal, provided they have been proven ...

(i)-(vii) ...

(viii) incitement to strike in an unconstitutional manner.

The Supreme Court held that 'instant dismissal' merely meant 'dismissal' as opposed to other penalties and could not 'possibly mean dismissal without a hearing'.⁷⁶ Further, the words 'provided they have been proven' clearly envisaged a hearing. Although the Supreme Court dealt with the issues on the basis of an interpretation of the particular code, a code cannot provide for a dismissal without a hearing as that would be *ultra vires* the right not to be unfairly dismissed in section 12B(1) of the Act.

Legal representation

Before the enactment of the Constitution of Zimbabwe in 2013 it was clear that where a hearing was before a court of law, denial of legal

⁷⁴ 1997/(2) ZLR 473 (H).

⁷⁵ SC 23/2003. See also *Brake & Clutch (Pvt) Ltd v Jolify Nyama* SC 42/2001.

⁷⁶ At p.5.

representation automatically infringed the right to a fair hearing, while in cases before a tribunal other than a court of law, the issue had not been authoritatively decided.⁷⁷ In *MMCZ v Mazvimavi*⁷⁸ the Supreme Court ruled that in employment codes of conduct, the right to be legally represented depended on the provisions of the code itself. There would be a right if the code provided for it. In other words, there is no inherent right to legal representation under code of conduct proceedings. This approach is backed by the South African cases cited by the Supreme Court⁷⁹ and is not inconsistent with section 101(3)(f) of the Act, which merely requires that an employee be given a right to be heard. Representation by a workers' committee or trade union member appeared to be adequate compliance with both the Act and the natural justice principle of a fair hearing. It is valid for the code to prohibit legal representation.

In *Musarira v Anglo-American Corp.*⁸⁰ the Supreme Court continued on this path of insisting that there is no inherent right to legal representation in code of conduct proceedings.

The position of the law in *MMCZ v Mazvimavi* case (*supra*) was subsequently amplified and raised to the following: where the code of conduct makes no mention of a right to legal representation, but an employee who is facing a charge of misconduct which might lead to his dismissal wishes to have legal representation and his or her request is refused, the requirements of the *audi alteram partem* rule would not be met.⁸¹ On this further development, the right to legal representation was not automatic, but was a matter of discretion for the tribunal concerned. The discretion depended on two key elements: the seriousness of the charge of misconduct and the employee's request to have legal representation. Where the charge of misconduct was serious and the employee requested legal representation, it was an improper exercise of discretion by the disciplinary committee to refuse legal representation. This approach was anchored on the often-quoted remarks of Lord Denning MR in *Pett v Greyhound*

77 *City of Mutare v Mlambo* 1992 (1) ZLR 17 (S) at 21; *Vice Chancellor, University of Zimbabwe & Anor v Mutasah & Anor* 1993 (1) ZLR 162 at 174G-H.

78 1995 (2) ZLR 353 (S).

79 *Dabner v SAR & H* 1920 AD 583 at 598; *Cuppan v Cape Display Supply Chain Services* 1995 (4) SA175 (D) at 182 G-1.

80 2005 (2) ZLR 267 (S).

81 *Chirenga v Delta Distribution* 2003 (1) ZLR 517 (H).

*Racing Association Ltd*⁸² as follows:

Mr Pett is here facing a serious charge... If he is found guilty, he may be suspended or his licence may not be renewed. The charge concerns his reputation and his livelihood. On such an enquiry I think that he is entitled not only to appear by himself but also to appoint an agent to act for him... Once it is seen that a man has a right to appear with an agent, then I see no reason why that agent should not be a lawyer. It is not every man who has the ability to defend himself on his own. He cannot bring out the points in his own favour or the weaknesses in the other side. He may be tongue-tied or nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it every day. A magistrate says to a man, 'You can ask any questions you like'; whereupon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him. And who better than a lawyer who has been trained for the task? I should have thought, therefore, that when a man's reputation or livelihood is at stake, he not only has a right to speak by his own mouth, he has also a right to speak by counsel or solicitor... Natural justice then requires that he can be defended, if he wishes, by counsel or solicitor.

The Constitution of Zimbabwe, 2013 fundamentally improves this position. It makes the right to legal representation a fundamental right available in all situations as a facet of the right to a fair hearing. It says, in section 69(4) that:

Every person has a right, at their own expense, to choose and be represented by a legal practitioner before any court, tribunal or forum.

Although the Constitution does not define the word 'forum', it is clear that it encompasses disciplinary committees or authorities set up in terms of a code of conduct. This is because the word 'forum' must be taken to mean a thing which is neither a court nor a tribunal but is of a judicial or quasi-judicial character. Accordingly, a clause in a code of conduct prohibiting legal representation is void.

Where an accused employee's legal practitioner's request for a post-
82 [1969] 1 QB 125 at 132A-133A; [1968] 2 All ER 545 at 549C-I.

ponement is justifiably turned down and the disciplinary proceedings subsequently take place without the legal practitioner, there is no infringement of the right to a fair hearing if there is a reasonable time between the turning down of the request and the commencement of the hearing.⁸³ The reasonable time between the turning down of the request for postponement and the commencement of the hearing is for the accused employee to instruct another lawyer who can be available. If the accused employee fails to utilize the opportunity to secure another lawyer who can be available at the hearing, there is no infringement of the right to a fair hearing. The test for whether or not the turning down of the request is justifiable is an objective one.

Viva voce evidence and cross-examination

In the absence of specific provisions in the code, it is well established that at a hearing into allegations of misconduct, it is not necessary that *viva voce* evidence be led.⁸⁴ As long as there is a fair hearing, there is no particular form of hearing prescribed, as employers cannot be expected to handle disciplinary proceedings according to the rigorous standards of a court of law. Evidence may be led by way of statements or affidavits. Where reliance is to be placed on any statements or affidavits, the accused employee must be shown the statements, but there is no inherent right to cross-examine the maker of a statement. In other words, the right to cross-examine witnesses does not automatically qualify as part of the *audi alteram partem* rule.⁸⁵ If the accused employee wishes to cross-examine any maker of a statement, he or she must point that out to the disciplinary committee and indicate his or her basis for wanting to cross-examine. The disciplinary committee has the discretion to accept or reject the request. If the rejection of a request to cross-examine is unreasonable, the hearing may cease to be a fair hearing.

The witnesses must give *viva voce* evidence in the presence of the accused employee and there is a right to cross-examination.⁸⁶ It is not acceptable for a witness to give evidence in the absence of the accused employee and then invite the accused employee to conduct a cross-ex-

83 *Gershun Hombarume v Zimbabwe Revenue Authority* SC 24/2010.

84 *Chataira v ZESA* 2001 (1) ZLR 30 (H).

85 *Ibid* See also *Zimbabwe Financial Holdings v Mafunga* 2005 (2) ZLR 289 (S).

86 *Mawuta v Secretary for Finance* 2003 (2) ZLR 323 (H).

amination.⁸⁷

Bias

All misconduct cases have a certain element of what has been termed ‘institutional bias’, in that the charge of misconduct is preferred by an employer against an employee.⁸⁸ Notwithstanding this, it is important that disciplinary proceedings be conducted in a manner that is fair and impartial. Bias exists where there is a reasonable ground for the employee to believe that there is no fair hearing.⁸⁹ There is no closed list of such reasonable grounds. For example, the investigating officer cannot also be the presiding officer. There must be separation of roles between the prosecutor and the presiding officer.

The test for bias is settled. In *Porter v Magill* [2002] 2 AC 357 it was stated that there is bias if ‘the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased’.

The test is not whether or not the tribunal was in fact biased; the test is an objective one and bias is established if there is a reasonable suspicion that the tribunal might be biased. The rationale for this legal position is the oft-quoted dictum that ‘justice should not only be done but should manifestly and undoubtedly be seen to be done’. In *Leopard Rock Hotel Co. (Pvt) Ltd v Walenn Construction (Pvt) Ltd* 1994 (1) ZLR 255 (S) at 297A, Korsah JA said:

A common theme which runs through the authorities is, therefore, that the test to be applied is an objective one. One does not enquire into the mind of the person challenged to determine whether or not he was or would be actually biased. Thus the character, professionalism, experience or ability as to make it unlikely, despite the existence of circumstances suggesting a possibility of bias arising out of some conflict of interest, that he would yield to infamy, do not fall for consideration.

Penalties in the code of conduct

It is trite that even though a code of conduct may prescribe a particular

⁸⁷ Ibid.

⁸⁸ *Musarira v Anglo-American Corporation* 2005 (2) ZLR 267 (S) at 270G.

⁸⁹ Ibid.

punishment for a particular offence, the punishment prescribed is the maximum permissible. It is not mandatory to impose the maximum penalty. This legal position was enunciated in clear terms by Gillespie J in *Zikiti v United Bottlers Ltd*⁹⁰ as follows:

*The meaning of such a schedule of offences and punishment is generally, and is certainly in this case, that the punishment prescribed is the maximum permissible. The employer, through the properly constituted disciplinary organs, then has to decide whether to impose that maximum or something less.*⁹¹

It is a serious misdirection for a disciplinary committee to act on the basis that it has no discretion but to impose the maximum penalty.

This approach obtained its seal in *Coh Coh Enterprises (Pvt) Ltd v Mativenga & Anor*⁹² where the Supreme Court stated that where a code provided that certain conduct ‘warrants’ dismissal, it did not mean that if the conduct was proved, dismissal inevitably followed. In a proper case, a lesser penalty may be imposed.

The common law principle involved is that the imposition of a penalty is a matter of discretion and therefore, in the absence of specific provisions to the contrary, codes of conduct are taken to be enshrining the principle. This principle has also been applied to situations where the code determines a penalty on the basis of whether the offence is being committed for the first, second or third time. For a serious offence, the code may prescribe ‘a final written warning’ for the first offence and a ‘dismissal’ for the second offence. With minor offences, it may prescribe a ‘recorded verbal warning’ for the first offence, ‘first written warning valid for 3 months’ for the second, ‘second written warning valid for 6 months’ for the third and a ‘final written warning valid for 12 months’ for the fourth.

In *Toyota Zimbabwe v Posi*⁹³ the Supreme Court applied the principle of a penalty being a matter of discretion to hold that an employer is not precluded from imposing the penalty of dismissal for a first offend-

90 1998 (1) ZLR 389 (H).

91 At p.396 F-G.

92 2001 (1) ZLR 151 (S).

93 2008 (1) ZLR 173 (S).

er even where the code prescribes a lesser penalty for a first offence, if the offence is committed in aggravating circumstances. In that case, the code, for what it termed ‘serious breaches’, provided a ‘final written warning valid for 12 months and/or demotion and suspension without pay for up to 30 days’ for a first offence and ‘dismissal’ for a second offence. Posi was convicted of the offence of ‘gross negligence’, which was classified as a ‘serious breach’. Since it was his first breach, he argued that the disciplinary committee was bound to impose the penalty of a ‘final written warning valid for 12 months and/or demotion and/or suspension without pay for up to 30 days’. In other words, his argument was that the disciplinary committee had no discretion in the matter. The disciplinary committee rejected the argument and imposed the penalty of dismissal. On appeal to the Labour Court, the contention that the disciplinary committee had no discretion was accepted. The Labour Court set aside the penalty of dismissal. The employer appealed to the Supreme Court and succeeded. The Supreme Court held that the employer still had discretion, notwithstanding the different penalties for a first and second offence. Accordingly, an employer may impose the penalty of dismissal for a first offence if the misconduct is such that dismissal would be the most appropriate penalty.

An important issue with penalties under a code of conduct is the operation of progressive penalties for the commission of a ‘further offence’. Is it a ‘further offence’ in the same category? This depends on the wording of the code. The common interpretation is that it is a ‘further offence’ in the same category. Thus, in *Standard Chartered Bank Zimbabwe Ltd v Richardson*⁹⁴ the code of conduct provided that an employee was liable to dismissal if he or she committed ‘any further offence’ during the currency of a final warning. Before the expiry of the final warning, the respondent committed an act of negligence causing serious financial loss to the bank. The act fell into a different category of acts of misconduct. She was dismissed on the basis that she was already on a final warning. In the Supreme Court, the employer argued that ‘any further offence’ meant ‘any further offence in any other category’ while the employee was of the view that it meant ‘another offence in the same category’. The Supreme Court interpreted the code to mean ‘another offence in the same category’ and dismissed the employer’s appeal.⁹⁵

94 2000 (1) ZLR 153 (S).

95 See also *Fawcett Security Operations (Pvt) Ltd v Amos Phiri* SC 53/2000.

What is the effect of an improper composition of the disciplinary committee?

If a disciplinary committee established in terms of a registered code of conduct is not properly constituted, the disciplinary proceedings are rendered null and void. This was expressed emphatically by Sandura JA in *Madoda v Tanganda Tea Co. Ltd*⁹⁶ as follows:

In my view, where a disciplinary committee is established in terms of a registered code of conduct and the composition of the committee is not as provided for in the code, the deviation from the provisions of the code constitutes a procedural irregularity.

A registered code of conduct indicates which persons constitute a given level of the disciplinary structure. Suppose a person or persons other than those specified in the code sit and participate in the deliberations of the disciplinary committee, does this nullify the proceedings? In *MMCZ v Mazvimavi*,⁹⁷ the Supreme Court held that allowing persons other than those specified in the code to sit and participate in the deliberations of a disciplinary committee is a procedural irregularity which renders the proceedings, at the very least, voidable at the instance of the workers concerned.⁹⁸ The court also made this statement:

*The irregularity was calculated to prejudice the respondent and was not shown by the corporation not to have caused any prejudice.*⁹⁹

It is not clear what this prejudice element was meant to add to the voidability of the proceedings. If the suggestion is that notwithstanding an irregular composition of the disciplinary committee, the proceedings are only voidable if the employee has been prejudiced thereby, that cannot be correct. What is consistent with the provisions of the Labour Act is that mere failure to comply with the code is sufficient to render the proceedings voidable, regardless of whether or not any prejudice has been suffered. This is because the registration of a code shields an employer from any charge of an automatically unfair dismissal if there is compli-

96 1999 (1) ZLR 374 (S) at 379C.

97 1995 (2) ZLR 353 (S).

98 At p.362D-F. See also *Madoda v Tanganda Tea Co. Ltd* (*supra*).

99 At p.362 E-F.

ance with the code regarding termination of employment¹⁰⁰ and prohibits certain interventions by a labour officer.¹⁰¹ As such, it must have been intended that only strict compliance with the code warrants exemption from protective legislation.

In *Madoda v Tanganda Tea Co. Ltd* the proceedings were rendered null and void for failure to comply with the provisions relating to the composition of the disciplinary committee. The two workers' committee representatives required by the code were not on the committee that conducted the hearing and the proceedings were thereby rendered invalid. In *Standard Chartered Bank of Zimbabwe Ltd v Julius Chikomwe & Ors*,¹⁰² the code defined the disciplinary committee as follows:

... a committee comprising two employee representatives appointed annually by employee members and two employer representatives which hears appeals from the decision of the hearing officer.

The employee representatives had been hand-picked by the employer and were not 'appointed' by employees as required by the code. The employer had also used a number of committees for the hearings as many employees were involved but the code provided for one committee. These non-compliances rendered the proceedings a nullity and they were set aside.

In *Pangeti v Grain Marketing Board*¹⁰³ no member of the workers' committee sat when the code stipulated for three to sit. The proceedings were declared a nullity. In *Sable Chemical Industries Ltd v Easterbrook*¹⁰⁴ the code of conduct provided that the disciplinary committee was to be chaired by the personnel manager or his nominee and was to comprise a member of management from the department or section, two members of the workers' committee, the offender, the offender's representative and a representative from the personnel department to record the proceedings. Instead, the disciplinary committee was composed of the acting general manager, the offender and an official from the Human Resources Department who was present to record the proceedings. Although the acting

100 Section 12B (2).

101 Section 101 (5).

102 SC 77/2000.

103 2002 (1) ZLR 454 (H).

104 2010 (1) ZLR 342 (S).

general manager was not provided for in the code, he presided over the proceedings on his own and thereafter found the employee guilty and dismissed him. The proceedings were declared null and void.

In *Medical Investments Ltd t/a Avenues Clinic v Florence Chingwena* a disciplinary and grievances committee which included two managers and two worker representatives was constituted to deal with allegations of misconduct levelled against the employee. In the course of the proceedings, one of the two managerial representatives who was the chairman became unavailable. The other managerial representative assumed the chairmanship and the proceedings continued. The employee was found guilty and dismissed. The employee challenged the proceedings on review in the Labour Court, on the basis that the disciplinary committee had not been properly constituted. The Labour Court agreed on three main grounds, namely (i) it was improper for one of the two managerial representatives to chair the committee, (ii) when the remaining managerial representative assumed the chairmanship, the committee remained without a managerial representative, and (iii) the managerial representative who assumed chairmanship was a subordinate of the employee being charged. On appeal, the Supreme Court overturned the Labour Court's decision and held that there was nothing improper about the composition. The code allowed the chairing to be by one of the managerial's representatives. There was no provision in the code for an independent chairperson. The managerial representative who assumed the chairmanship still remained a member of the committee since he had a casting vote, so the committee remained with a managerial representative. Further, in terms of the code, it was not improper for a subordinate to sit in judgment in a matter involving a more senior managerial employee. The case therefore turned on an interpretation of the applicable code.

The issue of prejudice is only relevant in cases where, in an otherwise properly constituted committee, there is, in addition, a stranger (that is, a person who is not supposed to be part of the committee) who participates in the proceedings, such as by putting questions to witnesses. The proceedings are voidable at the instance of the employee but the employer may still have the proceedings upheld if it shows that no prejudice was suffered as a result of the irregularity.¹⁰⁵

That the element of prejudice is required in situations involving the

105 *MMCZ v Mazvimavi; Madoda v Tanganda Tea Co.Ltd.*

participation of a stranger is confirmed by *Merchant Bank of Central Africa v Dube*.¹⁰⁶ In that case, the proceedings were vitiated by the presence of a consultant who was shown to have participated in a way calculated to prejudice the employee. It not being shown that there was no prejudice to the employee, the proceedings were nullified.

In appropriate cases, the question of waiver may be raised if, notwithstanding improper composition, the employee is taken to have consented to the composition. The employee is then said to have waived his or her right to impeach the composition of the committee. Waiver is a question of fact and must be proved, but mere attendance to answer allegations of misconduct is not waiver.¹⁰⁷

Compliance with procedures specified in the code

The general rule is that it is not all procedural irregularities in disciplinary proceedings in terms of a code of conduct which vitiate such proceedings. To have the proceedings set aside on the basis of a procedural irregularity, it must be shown that the employee concerned was prejudiced by the irregularity.¹⁰⁸ A good example of a procedural irregularity which could not vitiate proceedings because there was no prejudice, is found in *Nyahuma v Barclays Bank (Pvt) Ltd*.¹⁰⁹ The code provided that the grievance and disciplinary committee had to meet within seven working days of receiving an appeal. Nyahuma noted his appeal but the meeting of the disciplinary committee was not held within seven working days. Instead, it took place four days after the last day on which it should have been held. Nyahuma did present his case when the committee met. It was held that the short delay in convening the meeting did not in any way prejudice Nyahuma and therefore the proceedings were not vitiated.

Procedural irregularities in code of conduct proceedings are of two types: those of a serious nature which vitiate the proceedings at the instance of the concerned employee without any proof of prejudice suffered by him or her as a result thereof, and those not of a very serious nature which can only vitiate proceedings if shown to have caused prej-

106 2004 (1) ZLR 155 (S).

107 *Sable Chemical Industries Ltd v Easterbrook* 2010 (1) ZLR 342 (S).

108 *Nyahuma v Barclays Bank (Pvt) Ltd* 2005 (2) ZLR 435 (S).

109 *Ibid*.

udice. *Nyahuma v Barclays Bank (Pvt) Ltd*¹¹⁰ illustrates both types of procedural irregularities. The code provided as follows:

Should the grievance and disciplinary committee fail to reach a consensus, a further meeting shall be convened after not less than three working days and not more than seven working days after the first deadlock, to determine whether the committee is able to reach a consensus. Should the committee fail to reach a consensus the second time, the secretary of the committee shall forward written record of (the) proceedings within a further seven working days, to the appeals board for consideration...

When the committee reached a deadlock, it remitted the matter to the human resources department with the request that another committee be set up to consider the appeal, instead of the committee itself holding a further meeting. A second committee was set up to consider the matter. It was held that this was a serious procedural irregularity which vitiated the proceedings of the second committee without any proof of prejudice.

In *Mabhena v PG Industries*¹¹¹ Mungwira J said, *obiter*:

Compliance with code provisions on matters of discipline and appeal structures and any action taken ought clearly to be in accordance with the agreed rules. In other words, the existence of the code implies some essential procedural requirements to be observed and failure to observe them may result in dismissal being declared void.

In *Mugwebie v Seed Co. Ltd & Anor*¹¹² the employer suspended an employee without following the provisions of the code requiring the appointment of a ‘designated officer’ to investigate an offence before suspension. The Supreme Court held the purported suspension to be a nullity.

In *Securitas (Pvt) Ltd v Husa Musora*¹¹³ the code provided as follows:

... the employer shall examine such evidence and the report in detail and may take such further evidence in whatever form he considers appropriate, having due regard to the principles of natural justice or fairness and in particular shall afford the

110 Ibid.

111 2002 (2) ZLR 63 (H) at 73C.

112 2000 (1) ZLR 93 (S).

113 SC 15/2000.

employee the opportunity of appearing before him.

The employer, after receiving a report from a designated officer, simply dismissed the employee without affording him an opportunity to appear before it. This was contrary to the express provisions of the code and this rendered the dismissal a nullity.

Establishing the offence and the standard of proof

In determining whether or not an employee is guilty of the offence charged, the disciplinary committee must rely on facts. To convict, the proved facts must disclose the offence with which the employee has been charged. Where the offence is not proved, the employee is entitled to an acquittal.¹¹⁴ The onus of proof is on the employer under the principle that in civil proceedings the party who seeks a remedy must prove the grounds thereof.¹¹⁵

The standard of proof, even where the alleged act of misconduct is also of a criminal nature, is on a balance of probabilities.¹¹⁶ In *ZESA v Dera* the employee was accused of theft. A disciplinary committee found him guilty on a balance of probabilities and authorised his dismissal. The employee appealed to the Labour Relations Tribunal which reversed the disciplinary committee's ruling by holding that, since the allegation was of a criminal nature, the employer had to prove it beyond any reasonable doubt. The employer appealed to the Supreme Court and succeeded. The Supreme Court reiterated that in all civil cases, including those where allegations are of a criminal nature, proof remains on a balance of probabilities. Disciplinary proceedings in employment matters are different from disciplinary proceedings involving professionals, such as lawyers and doctors, presided over by tribunals set up by statute. In the latter, if the allegations are of a criminal nature, proof must be beyond a reasonable doubt notwithstanding the civil nature of the proceedings.¹¹⁷ This is because a finding of guilty in the civil proceedings has drastic public law consequences, such as removal from a statutorily recognized office of trust. For the same reason, in civil proceedings challenging an election result, allegations of a criminal nature must be proved beyond a reasona-

114 *CABS v Rugwete* 2009 (2) ZLR 26 (S) at 300-31G.

115 *Book v Davidson* 1988 (1) ZLR 365 (S) at 384B-F.

116 *ZESA v Dera* 1998 (1) ZLR 500 (S); *Zimbabwe Financial Holdings v Mafunga* 2005 (2) ZLR 289 (S).

117 *Mugabe & Anor v Law Society of Zimbabwe* 1994 (2) ZLR 356 (S).

ble doubt as an elected person may lose his or her seat.¹¹⁸

In *Astra Industries Ltd v Peter Chamburuka*,¹¹⁹ Omerjee AJA, without referring to *ZESA v Dera*, appeared to leave room for importing ‘proof beyond reasonable doubt’ in employment matters. He was clearly wrong, as the position is settled by *ZESA v Dera* and re-affirmed in *Lawsign Nyarumbu v Sandvik Mining & Construction Zimbabwe (Pvt) Ltd*.¹²⁰

As what is required is proof on a balance of probabilities, reliance may be placed on affidavits, without *viva voce* evidence and therefore without cross-examination if the affidavits, when taken together with other evidence, lead to a reasonable finding.¹²¹

The nature of the misconduct constituting an offence must be as defined in the code of conduct. The label put to the misconduct is not the main target; what must be considered is the agreed definition of the misconduct. If the facts establish the misconduct, the offence is established, whether or not it is consistent with the ordinarily understood notion of the offence under the common law or legislation.¹²² Thus, in *Zimbabwe Mining & Smelting Co. v Zakeyo*¹²³ the employee was charged with the offence of ‘theft or fraud’, which was provided for in the code. The code defined ‘theft or fraud’ as follows:

...without in any way detracting from the ordinary meaning of the words, mean inducing or attempting to induce any person to perform any corrupt act; applying or attempting to apply to a wrong use or any unauthorized purpose any funds, assets or property belonging to the company.

In terms of this definition, mere ‘unauthorized use’ constituted theft. It was held by the Supreme Court that it was not necessary, for purposes of this offence as defined in the code, to establish that the property which had been put to an ‘unauthorised use’ had been fraudulently taken away from the employer. Malaba JA (as he then was) explained this:

118 *Matimisa v Chiyangwa & Anor (Chinhoyi Election Petition)* 2001 (1) ZLR 334 (H).

119 SC 27/2012.

120 SC 31/2013 at p. 3. See also *Zimnat Insurance Co. Ltd v George Dube & Anor.* SC 46/2097.

121 *Zimbabwe Financial Holdings v Mafunga* 2005 (2) ZLR 289 (S).

122 *Zimbabwe Mining & Smelting Co. v Zakeyo* 2007 (1) ZLR 132 (S).

123 *Ibid.*

It seems to me it does not matter very much in cases of misconduct at workplaces what label one puts to the facts as long as they establish the conduct which the parties intended to regulate. The conduct in this case did not have to embody the essential elements of the common law crime of theft. The parties were at liberty to agree, as they did, upon a definition of misconduct wider than what would ordinarily be prescribed under criminal law. Under common law, 'unauthorized use' of property belonging to another with the intention of returning it would not constitute the offence of theft and yet under the ZIMASCO code of conduct, it constitutes theft.¹²⁴

The existence of a factual basis is also essential for any defences the employee may put across. In *Circle Cement (Pvt) Ltd v Nyawasha*,¹²⁵ Nyawasha was employed by Circle Cement as a sister-in-charge of the occupational health, safety and environment department. She was offered a place to study for a diploma in community health at the University of Zimbabwe. She commenced her studies without having obtained leave of absence from the employer. When the employer discovered that she had not been granted leave of absence, she was recalled to work. She resumed work after having been absent without leave for 19 days. She was charged with the offence of absence from work for five or more working days without the employer's permission or without reasonable cause in contravention of the employment code of conduct. In answer to the charge, she admitted that she had not obtained leave of absence but alleged that she was confused as to the person from whom she had been expected to seek leave. This defence was rejected by the disciplinary committee. She was dismissed. On appeal to the Labour Court, the latter set aside the dismissal on the basis that she must have been genuinely mistaken as to the need to formally apply for leave. The Supreme Court set aside the Labour Court decision on the ground that there was no factual basis for the Labour Court's view that she had been genuinely mistaken. There was no evidence suggesting a mistaken belief. She had not said it before the disciplinary committee.

Where evidence does not support charge preferred by employer

Where the evidence does not support the charge preferred by the

124 At p. 139B.

125 2004 (1) ZLR 243 (S).

employer, the accused employee is entitled to an acquittal, it not being the responsibility of the disciplinary committee to formulate charges.¹²⁶

Even if the evidence discloses some other offence in the code, the accused employee is still entitled to an acquittal unless that other offence had also been preferred as an alternative charge.¹²⁷ The disciplinary committee is not entitled, *mero motu*, to substitute the wrong charge with another charge disclosed by the evidence. Even for the Labour Court, the power to substitute its own decision or order does not permit it, *mero motu*, to substitute its own charge or make a finding of guilty on an entirely different charge.¹²⁸ The accused employee must be acquitted, leaving it to the employer to decide whether or not to prefer fresh charges.

The concept of competent verdicts in criminal law and procedure does not apply to misconduct under a code of conduct. In the case *Lawsign Nyarumbu (supra)*,¹²⁹ the employee had been found guilty of theft by the disciplinary committee, but this was set aside by the National Employment Council. On appeal by the employer to the Labour Court, the latter found the employee not guilty of theft. However, it found him guilty of negligence on the basis that the evidence disclosed that offence. The Labour Court set aside the conviction for theft and substituted a conviction for negligent performance of duty resulting in loss to the employer. It still confirmed the penalty of dismissal. The Supreme Court held that negligence was, in terms of the code, not a competent verdict on the particular charge of theft. It allowed the appeal and ordered reinstatement of the employee. It is submitted that the language of ‘competent verdicts’ must be avoided. In view of the protection against unfair dismissal, codes of conduct must not provide for competent verdicts. The principle is that if the proved facts do not disclose the offence charged, the employee must be acquitted unless the offence disclosed by the evidence has been preferred as an alternative charge.

126 *ZIMASC-O (Pvt) Ltd v Chizema* 2007 (2) ZLR 314 (S).

127 *Ibid.*

128 *Lawsign Nyarumbu v Sandvik Mining & Construction Zimbabwe (Pvt) Ltd* SC 31/2013.

129 SC 31/2013

Common Offences

Conduct inconsistent with the fulfilment of the express or implied conditions of the contract of employment

If a code of conduct provides for this offence, the parties are taken to intend it to have the same meaning as under the Model Code, where it covers those instances which, under the common law, justify summary dismissal.¹³⁰ In *Zimbabwe Mining & Smelting Co. v Zakeyo*,¹³¹ the code provided for this offence and it was one of the offences with which the employee was charged. It was alleged that he had not disclosed a personal interest which was likely to give rise to a conflict of interest. The Labour Court had agreed with the employee that what had to be disclosed was an 'actual conflict of interest' and not a 'potential conflict interest'. The Supreme Court disagreed and applied the common law position on conflict of interest, which requires disclosure not only of actual conflict of interest but also of a potential conflict of interest.¹³² The employee was held to have committed the offence as provided for in the code.

In *Mvere v Tanganda Tea Co. Ltd*,¹³³ the employee was an accountant. She became angry when colleagues were instructed to review her work for the purposes of an audit, so she defaced five monthly bank reconciliation statements which a colleague had signed to indicate that he had checked them, by tearing off his signature. The employer regarded this as serious misconduct and she was charged under the code with conduct inconsistent with her terms and conditions of employment. It was held that her conduct breached her implied duty to preserve the integrity of the documents. She had a duty to preserve official documents in her custody in a complete and regular state. Her conduct was said to have undermined the relationship with her employer. She was found guilty and dismissed and this was upheld by the Supreme Court.

It is not every breach of a contractual obligation by an employee that constitutes conduct inconsistent with the express or implied conditions of his or her employment. To constitute a contravention of the code, the breach must be of a serious nature. In *Marvo Stationery Manufacturing*

130 Chapter 6.

131 2007 (1) ZLR 132 (S).

132 At p. 139E-141B.

133 2004 (2) ZLR 271 (S).

(Pvt) Ltd v Jokwani & Ors,¹³⁴ the employees were found gambling at the workplace during working hours. A provision in the code provided that discharge was the final sanction and should be applied ‘when the offence committed is of so serious a nature that it amounts to a breach of or a repudiation of (an employee’s) contractual obligations such as...’ The provision gave some examples of acts of misconduct. The examples did not include gambling. Although the evidence disclosed that the gambling which had taken place was an isolated occurrence, the employees were dismissed in terms of the code. The Supreme Court held that for gambling to be covered by the provision of the code, it had to be of a serious nature. In this case, it was a one-off occurrence and was therefore not of a serious enough nature to be classified as an act of misconduct under the code.

Gross negligence

‘Gross negligence’ is ordinary negligence of an aggravated form which falls short of wilfulness, but the decision as to whether negligence is gross or ordinary is a value judgment based on an assessment of the facts of each case.¹³⁵

In *Standard Chartered Bank of Zimbabwe Ltd v Chipiningu*,¹³⁶ the following descriptions of gross negligence were approved:

Gross negligence (culpa lata, crassa) connotes recklessness, an entire failure to give consideration to the consequences of his actions, a total disregard of duty.

and

There is, in short, no generally accepted meaning; but the probability is, when the phrase is used, that it signifies more than ordinary inadvertence or inattention but less than conscious indifference to consequences, and that is, in other words, merely an extreme departure from the ordinary standard of care.

Who makes the decision?

Unless there is a specific provision to the contrary, the decision must be that of the disciplinary committee and not the chairperson. Accordingly, it must be clear from the conduct of the proceedings that the verdict reached

134 2005 (2) ZLR 261 (S).

135 *Nyahuma v Barclays Bank (Pvt) Ltd* 2005 (2) ZLR 445 (S).

136 2004 (2) ZLR 94 (S) at p. 99.

is that of the majority.¹³⁷ If the chairperson purports to make a decision on behalf of the disciplinary committee, that decision is null and void.¹³⁸ In *Zimbabwe Revenue Authority v Mpindiwa*,¹³⁹ Lindiwe Mpindiwa had been found guilty and dismissed by the disciplinary and grievance committee, and appealed to the appeals committee. After the appeal had been heard, the appeals committee adjourned and agreed to have minutes of the proceedings typed and thereafter meet to reach a verdict. The chairperson wrote a letter to the human resources manager as follows:

The committee did not reach a consensus on the various issues under consideration in this case. From the deliberations of the appeals committee, I recommend that the verdict passed up by the disciplinary and grievance committee be upheld...

He also wrote to Lindiwe saying:

For the avoidance of doubt, this is to advise that after the committee deliberated over the matter, I, as the chairman, have found no reason to interfere with the decision of the disciplinary and grievance committee. This means you remain dismissed. In terms of the code of conduct you have a right to appeal against this decision to the Labour Court.

The Supreme Court held that the chairperson's decision was null and void and of no force and effect. This meant that Mpindiwa's appeal had not been determined by the appeals committee.

Is the Employee entitled to Re-instatement if court proceedings are nullified?

The answer depends on whether or not the irregular proceedings are being set aside pursuant to a review or an appeal. Where it is an appeal to the Labour Court, the general principle of 'reinstatement or damages' is applicable and there is no automatic reinstatement.

In *Minerals Marketing Corporation of Zimbabwe v Mazvimavi* (*supra*), the Supreme Court, after setting aside the proceedings of the disciplinary committee, ordered that the worker 'be placed in the position he was in prior to' the date of the defective hearing. This effectively

137 See *MMCZ v Mazvimavi* 1995 (S) ZLR 353 (S).

138 *Zimbabwe Revenue Authority v Mpindiwa* 2007 (2) ZLR 49 (S).

139 *Ibid.*

amounted to reinstatement. In *Air Zimbabwe Corporation v Mlambo*,¹⁴⁰ the Supreme Court avoided the language of ‘reinstatement’ and held that once the Tribunal had set aside the proceedings and had no evidence to decide the issue on the merits, it must have followed the old section 101(8)(b) and remitted the matter to the committee concerned. In the words of McNally JA:

*Once it decides that the proceedings were fatally irregular, and that it cannot come to a conclusion on the merits, it has no choice but to remit.*¹⁴¹

In cases where code of conduct proceedings are being reviewed in the Labour Court or High Court, the question of ‘reinstatement or damages’ does not arise. A review is concerned with the decision-making process and the reviewing court is not entitled to go beyond either upholding or setting aside the proceedings. Where the proceedings are set aside, the employee is effectively reinstated and the court cannot, at the same time, give the employer the option of paying damages. As Gubbay CJ aptly put it in *Muringi v Air Zimbabwe Corporation & Anor*.¹⁴²

*The learned judge then went on to deal with what he believed to be the remaining issue of whether the appellant was deserving of an order for his reinstatement, or failing reinstatement, of an award of damages. It was in this respect that in an otherwise carefully reasoned judgment, the learned judge fell into error. The application before him was one of review. What was claimed was the impeachment of a decision of an administrative official, exercising a quasi-judicial function, on the grounds of procedural irregularity and bias. He was obliged to determine that issue alone and not to delve into the merits of the matter. Judicial review, as the phrase implies, is concerned not with the correctness of the decision but with the decision-making process.*¹⁴³

In *ZFC Ltd v Geza*¹⁴⁴ McNally JA said:

The relief available on review is that the proceedings or the

140 1997 (1) ZLR 220 (S).

141 At p. 223F.

142 1997 (2) ZLR 488 (S).

143 At p.490 E-F.

144 1998 (1) ZLR 137 (S) at 139A.

decision may be 'set aside or corrected' ... Miss Geza asked for a great deal more than that. She wanted an order that ZFC Ltd reinstate her or pay damages. That is the kind of relief one seeks on appeal, not on review. She was not granted that relief.

Does a code of conduct apply to disciplinary actions connected with a Strike?

There are three scenarios:

- (i) where the code of conduct has a specific provision prescribing participation in an unlawful collective job action as an offence;
- (ii) where the code of conduct provides that instigating and/or taking part in an unlawful collective job action shall be dealt with in terms of the Labour Act;
- (iii) where the code of conduct does not provide for participation in an unlawful collective job action as an offence.

For scenario (i), the starting point is *Cargo Carriers (Pvt) Ltd v Zambezi & Ors*.¹⁴⁵

In *Cargo Carriers (Pvt) Ltd v Zambezi and Ors*,¹⁴⁶ the employer purported to dismiss 322 striking employees pursuant to some disciplinary proceedings in terms of a registered code of conduct. The Supreme Court agreed with the High Court in holding that the code of conduct in question did not comprehend a situation in which 322 employees who had resorted to strike action were to be subjected to disciplinary proceedings. Accordingly, it held that the code of conduct did not apply and the resolution of the dispute, including any dismissals, had to be in terms of the collective job action provisions in Part XIII of the Labour Act.

Before the Supreme Court's subsequent decision in *Zimbabwe Iron & Steel Co. Ltd v Dube & Ors*,¹⁴⁷ two possible interpretations could have been put on the *Cargo Carriers* case, namely (i) all matters involving collective job action should be dealt with in terms of Part XIII of the Labour Act, regardless of the provisions of the code, and (ii) although a

145 1996 (1) ZLR 613 (S).

146 1996 (1) ZLR 613 (S).

147 1997 (2) ZLR 172 (S).

code may apply in matters involving collective job action, the peculiar problems associated with it will normally make it both legally and factually impossible to apply the code so that recourse should in that event be made to Part XIII of the Labour Act. In the *ZISCO* case, the Supreme Court rejected the first interpretation and, it is submitted, endorsed the second one. The position should therefore be regarded as follows: in each case involving collective job action, the court should examine whether there are any circumstances thereof which make it legally and factually impossible to comply with the code and thus leave Part XIII of the Labour Act as the only option. A close reading of the *Cargo Carriers* case shows that the circumstances which displace the code are those where 'the enormity of the problem' is such that the code cannot possibly apply. It was said there that 'there was no realistic way in which the appellant (employer) could convene a form of mass trial of 322 employees and stay within the parameters of the code of conduct'. Each case should therefore depend on its own facts. In *Julius Chikomwe & Ors v Standard Chartered Bank of Zimbabwe Ltd & Ors*,¹⁴⁸ Ziyambi J correctly observed that in terms of the *ZISCO* case, some cases of collective job action can still be dealt with under a code of conduct, but failed to indicate which factors she relied on to hold that the code in that case applied. Such an approach is wrong: the court should specifically indicate the factors which lead it to conclude that the code has not been displaced.

In that case the employees went on strike, but two days later a disposal order was issued directing that the strike be terminated. The employees obeyed the disposal order and returned to work. In spite of that, the employer took disciplinary action against the employees in terms of the code of conduct. The code of conduct made it an act of misconduct to incite a strike or participate in an 'illegal industrial action/strike'. The employees were found guilty and dismissed. The disposal order had not provided for the dismissal of striking workers. It was held that the employer was entitled to institute disciplinary proceedings in terms of the code of conduct notwithstanding the issuing of a disposal order which had terminated the strike. Said Gubbay JA (as he was):

The disciplinary proceedings held by the appellant were predicated on infringements by the respondents of the code of conduct consequential upon engaging in an unlawful strike

148 HH 203/1997.

*and other activity related to it (one of the gross infractions listed is 'illegal industrial action') and not on the validity or otherwise of the disposal order. There is nothing in the code itself that precludes the taking of disciplinary measures even where a disposal order validly made has directed that unlawful collective job action be terminated.*¹⁴⁹

Scenarios (ii) and (iii) yield the same legal position. Where the code of conduct specifically provides that instigating and/or taking part in an unlawful collective job action shall be dealt with in terms of the Labour Act, the employer cannot use the code to discipline striking employees on the specific offence of 'participation in an unlawful collective job action'.¹⁵⁰ This is the same position of the law where the code does not prescribe an unlawful collective job action as an offence. The code cannot be used to charge employees with the specific act of misconduct of 'participation in an unlawful collective job action'. However, in both scenarios, it is permissible for the employer to use the code to charge employees with other offences specified in the code which arise directly from the unlawful collective job action, such as absence from work without cause, violence or sabotage or conduct inconsistent with the express or implied conditions of employment.¹⁵¹ Thus, in the *Net-One Cellular* case (*supra*), the employer could not use the code to charge strikers with the offence of instigating or taking part in an unlawful collective job action because the code specifically provided that such an offence was to be dealt with in terms of the Labour Act. Instead, the employer charged the same employees with the offence of absence from work for five or more days without cause. The latter offence was specifically provided for in the code. The offence arose directly from the unlawful collective job action. This was held permissible by the Supreme Court. In the *CABS v Rugwete* case (*supra*), the employer could not use the code because it did not specify participation in an unlawful collective job action as an offence. Instead, the employer charged the same employees with the offences of 'sabotage' and 'violence', which were provided for in the code. These offences arose directly from the unlawful collective job action and the Supreme Court said this was a lawful approach.

149 At p. 175F.

150 *Net-One Cellular (Pvt) Ltd v Communications & Allied Workers Union of Zimbabwe* SC 89/2005.

151 *Ibid.* See also *CABS v Rugwete* 2009 (2) ZLR 26 (S).

This approach is a specific rejection of the views of Makarau J (as she then was) in *Communications & Allied Services Workers Union of Zimbabwe v Tel-One (Pvt) Ltd*¹⁵² where she said:

*For the respondent to proceed to charge the employees who engaged in collective job action under its code was grossly irregular and flies in the face of the express letter of the law. It is not permissible. It seeks in vain to make a code superior to the provisions of the Act under which the code is registered. A code is not part of the corpus juris of this country. It is essentially part of the terms of the contract of employment between employer and employee. It cannot override the law of the country.*¹⁵³

Appeals from the code of conduct proceedings to the Labour Court

Appeals from code of conduct proceedings lie to the Labour Court.¹⁵⁴ Two points regarding an appeal from code of conduct proceedings were made in the case of *Austin Muroyiwa v Delta Operations Ltd*.¹⁵⁵ First, the right to appeal to the Labour Court only arises after exhausting all the appeal levels specified in the code of conduct. Secondly, there is no requirement that a party appealing to the Labour Court be furnished with a copy of the record of the proceedings before filing a notice of appeal. This is fortified by the position that an appeal to the Labour Court is not an appeal in the strict sense as parties are not restricted to the record of proceedings. It is important, however, that the appellant be furnished with sufficient information required for purposes of noting an appeal. If the record is not yet ready before the filing of the notice of appeal, the appellant must be furnished with a summary of the record to enable the preparation of the notice of appeal. This must be regarded as a matter of right for the appellant, as section 101(3)(g) makes it mandatory for a code of conduct to provide for a ‘written record or summary to be made of any proceedings or decisions taken in terms of the employment code’.

What is the effect of an appeal from the code of conduct process to the Labour Court? The Act used to be silent on the matter. The Act was also silent on the effect of an appeal from the Labour Court to the Supreme

152 2005 (2) ZLR 280 (H).

153 At p 288C-D.

154 Section 92(1) of the Act.

155 SC 83/2000.

Court. In the old section 97(3) it was made clear that an appeal from a senior labour relations officer to the then Labour Relations Tribunal suspended the decision appealed against. In *PTC v Mahachi*,¹⁵⁶ Chatikobo J held that an appeal from the Labour Relations Tribunal to the Supreme Court suspended the decision appealed against. In appeals against the Minister's decision in retrenchment matters (where the regulations were also silent), it had been held that the Minister's decision was suspended pending appeal by operation of the common law rule.¹⁵⁷

However as regards appeals to the Labour Relations Tribunal from the code of conduct process, the courts sang a different song. Smith J held in *Chatizembwa v Circle Cement*¹⁵⁸ that such an appeal did not suspend the judgment appealed against. This was endorsed *obiter* by Gillespie J in *Vengesai & Ors v Zimbabwe Glass Industries Ltd*¹⁵⁹ and followed by Mungwira J in *Founders Building Society v Mazuka*.¹⁶⁰ In *Mhowa v Beverley Building Society*¹⁶¹ the matter was left open by the Supreme Court but was subsequently put to rest by that court in *UTC (Zimbabwe) (Pvt) Ltd v Chigwedere*.¹⁶² Gubbay CJ held that the common law rule of practice, that the noting of an appeal suspends the decision appealed against, did not apply to decisions made in terms of a code of conduct. Accordingly, an appeal to the Labour Relations Tribunal from a code of conduct proceedings did not suspend the decision appealed against. Two main grounds were used to reach this conclusion. First, it was reasoned that as a matter of interpretation of the Act, the silence was deliberate and the Legislature would have made it clear as it did in section 97(3) if it had intended to have the decision suspended pending appeal. Secondly, it was said that the nature of codes of conduct made it desirable that determinations made be not suspended pending appeal. Regarding this second ground, Gubbay CJ characterized determinations under a code of conduct as being of 'an individual employer, acting through an internal management committee' and a matter of private law. On the basis of this characteristic, it followed that such determinations could not be gov-

156 1997 (2) ZLR 71 (H).

157 *Phiri & Ors v Industrial Steel & Pipe (Pvt) Ltd* 1996 (1) ZLR 45-(S).

158 HH 121/1994.

159 1998-(2) ZLR 593 (H).

160 2000 (1) ZLR 528 (H).

161 1998 (1) ZLR 546 (S).

162 SC 21/2001.

erned by the common law rule of suspending decisions pending appeal because that rule did not apply to decisions of private persons but, at the very least, of public bodies such as courts and administrative functionaries. The *UTC (Zimbabwe)* case (*supra*) was followed in *Barclays Bank Zimbabwe Ltd v Mahachi*¹⁶³ and in *Southdown Holdings Ltd v Mariwa*.¹⁶⁴

The Legislature ended its silence in 2005.¹⁶⁵ The effect of an appeal from the code of conduct process to the Labour Court is now the same as that of any other appeal to the Labour Court. An appeal does not have the effect of suspending the determination or decision appealed against.¹⁶⁶

Section 92D grants a right of appeal against ‘a determination’ made under an employment code. Does ‘determination’ encompass a decision relating to what are called ‘grievances’, as distinct from acts of misconduct? It would appear that ‘determination’ refers to any decision made with finality under a code and thus covers both the disciplinary and grievance procedures.¹⁶⁷

Review of proceedings under a code of conduct

Section 101(7) of the then Labour Act provided as follows:

Any person aggrieved by:

- (a) a determination made in his case under a code: or
- (b) the conduct of any proceedings in terms of a code;
may within such time and in such manner as may be prescribed, appeal against such determination or conduct to the Tribunal.

In *MMCZ v Mazvimavi*¹⁶⁸ the Supreme Court had occasion to consider whether the above section clothed the Tribunal with general powers of review similar to those of the High Court. A general power of review would have enabled the Tribunal to determine, for instance, whether the

163 2004 (2) ZLR 126 (S).

164 2003 (2) ZLR 318 (H).

165 Through an amendment by Act No. 7 of 2005.

166 Section 92E(2) of the Act.

167 See *Olivine Industries (Pvt) Ltd v Jack & Ors* 2005 (1) ZLR 356 (S) which was decided under the old provisions of the Labour Relations Act. It is no longer a correct position of the law in so far as it may be taken to suggest the absence of a right to appeal to the Labour Court.

168 1995 (2) ZLR 353 (S).

proceedings under a code complied with the principles of natural justice.

The Supreme Court adopted a purely literal approach to the interpretation of the section. It held that had the Legislature intended to give review powers to the Tribunal, it would have said so in express terms, as it did in the old section 97(2)(b).¹⁶⁹ The use of the word 'appeal' instead of 'review' in section 101(7)(b) was thus taken to have been deliberate. Nor did it signal any intention to give review powers, it merely empowered the Tribunal to 'determine whether the conduct of the proceedings conformed with the specific clauses of the registered employment code of conduct, and not whether the manner of the proceedings thereunder offended the principles of natural justice'.¹⁷⁰ The result of this interpretation was that a person who sought a review of code of conduct proceedings had to approach the High Court for relief.¹⁷¹ This approach by the Supreme Court is of doubtful correctness. Although the Legislature had not used the word 'review' in section 101(7), it is submitted that the expression 'conduct of proceedings' could have been understood as encompassing a review. There was no reason why the Legislature gave review powers to the Tribunal in the old section 97(2)(b) regarding the conduct of proceedings by a senior labour relations officer and deliberately denied it to code of conduct proceedings. It appears that the expression 'conduct of proceedings' was wide enough to have permitted the Tribunal to exercise a review jurisdiction. The word 'appeal' does not appear to have been used in its technical sense of being distinct from a 'review.'

Secondly, the interpretation favoured by the Supreme Court led to a glaring absurdity, which could not have been intended by the Legislature. Codes of conduct are clearly intended to provide simple proceedings in relation to workers. The Supreme Court's interpretation meant that an aggrieved worker could not assume that the Tribunal had jurisdiction to hear his or her complaint. If he or she was seeking a review on general principles, recourse had to be to the High Court; in other cases, he or she had to approach the Tribunal. Presumably, where the grounds for the complaint included both matters suitable for a review and those warranting an appeal, he or she had to approach both the High Court and the Tribunal. Apart from the absurdity of a system that expected a worker to switch abruptly from the simple proceedings under a code of conduct to

169 At p. 357G and 358C.

170 At p. 358C-D.

171 At p. 358E.

the sophisticated procedures of the High Court, instead of the statutorily mandated informality of the Tribunal, the splitting of jurisdiction created a complex system inconsistent with the simplicity of code of conduct proceedings.

In 2005 the Legislature stepped in and gave the Labour Court ‘the same powers of review as would be exercisable by the High Court in respect of labour matters’.¹⁷² The effect of this is that code of conduct proceedings may be reviewed by the Labour Court at any stage and on any grounds of review, as long as it can be shown that the High Court would have exercised jurisdiction in similar circumstances. Two examples suffice. First, the doctrine of the exhaustion of domestic remedies utilized by the High Court to decline its review jurisdiction is applicable to the Labour Court in the exercise of its review jurisdiction under section 89(1).¹⁷³ Secondly, the Labour Court must respect the principle that a superior court may only review an interlocutory decision in exceptional cases where grave injustice would otherwise result.¹⁷⁴

A common issue whenever proceedings under a code of conduct are challenged on review is who the respondent must be. This issue stems from the fact that the proceedings are usually presided over by a senior employee or a disciplinary committee consisting of other employees of the employer. The High Court has held that the proper respondent is the employer and not the presiding employee or disciplinary committee.¹⁷⁵ Smith J said the following in *Chirenga v Delta Distribution*:¹⁷⁶

I consider that where an employee who has been dismissed wishes to bring under review the decision or proceedings of an employee or a committee consisting of employees of his employer which led to his dismissal, it would be adequate if the employer is cited. It would then be for the employer to ensure that the actions of the employee or committee have

172 Section 89 (1) (d1) of the Act.

173 See, for example, the approach in *Tutani v Minister of Labour & Ors* 1987 (2) ZLR 88 (H); *Zikiti v United Bottlers* 1998 (1) ZLR 389 (H); *Communications & Allied Services Workers Union of Zimbabwe v Tel-One (Pvt) Ltd* 2005 (2) ZLR 280 (H).

174 *Mashonganyika v Lena NO & Anor* 2001 (2) ZLR 103 (H).

175 *Sibanda v Postmaster General* w 263/1990; *Savanhu v Postmaster General* 1992 (2) ZLR 455 (H); *Chirenga v Delta Distribution* 2003 (1) ZLR 517 (H).

176 2003(1) ZLR 517 (H).

been recorded and explained in his opposing affidavit. The employer can always attach to his founding affidavit any record of proceedings or affidavit from the employee concerned.

CHAPTER EIGHT

TERMINATION OF EMPLOYMENT

(IV) RETRENCHMENT

Introduction

Retrenchments belong to the class of termination of employment commonly described as 'economic dismissals.' This class is distinctive in that on the one hand, workers lose their jobs without any fault (such as misconduct) or other reason (such as through the operation of the contract of employment) attributable to them, while on the other hand, the employer may be compelled by unavoidable economic considerations to terminate the services of some workers. Rycroft and Jordaan have expressed this distinctiveness in the following words:

Workforce reduction or retrenchment, because of recession, technological change, unionisation, disinvestment, transfer of the business or decentralisation has become a major issue of law and social policy. For the retrenched worker at a time of rising unemployment, the loss of a job frequently means 'disappearance into the large mass of the unemployed.' For the employer at a time of recession, to retrench is often the only way to ensure economic survival.¹

It is also important to emphasize that while a retrenchment is mere-

1 Rycroft and Jordaan (1992) p. 230.

ly one of the forms of termination of employment, its social, economic and political ramifications tend to be of a greater scale than other forms. Accordingly, it is not surprising that many countries have specific and sometimes elaborate legal provisions on retrenchment.

Rationale of Retrenchment Law

A question which arises at the outset is: what are the objectives of the law in this area? This is a controversial issue given the irreconcilable interests of the workers and the employer. The employer has the traditional claim to managerial prerogatives in determining the size and character of the workforce.² In *Lesney Products Co. Ltd v Nolan*³ Lord Denning underscored managerial prerogatives as follows:

It is important that nothing should be done to impair the ability of employers to reorganise their workforce and their terms and conditions of work so as to improve efficiency.

On the other hand, 'there is a growing refusal by workers to accept that retrenchment is the inevitable consequence of economic forces or technological change over which they have no control. Workers have come to expect procedural and substantive safeguards against retrenchment.'⁴

It has been said that the purpose of retrenchment law is to 'ensure that economic dismissals never occur, or at least to make it economically inadvisable for employers as long as the business remains solvent.'⁵

A number of justifications have been given for such a purpose of the law. The chief one is that an employee has a property right in his or her job. It was explained in an English case in this way:

*Just as a property owner has a right in his property and when he is deprived, he is entitled to compensation, so a long-term employee is considered to have a right of property in his job, he has a right to security and his rights gain in value with the years.'*⁶

Another justification is of distributive justice. The employer benefits

2 Deakin and Morris (1995) p.446.

3 [1974] ICR 170 [CA].

4 Rycroft and Jordaan, op.cit, p.230.

5 Collins (1992) p.144.

6 See *Wynes v Sonthrepps Hall Broiler Farm Ltd* [1968] ITR 407.

by improved productivity after reducing labour costs through retrenchment. It is then argued that those workers who have ‘sacrificed their jobs should partake of some of the benefits to general welfare derived from superior productivity’.⁷

It appears, however, that retrenchment law is not designed to prevent employers from retrenching but is mainly premised upon the need to strike a balance between the competing interests of employers and workers with a view to:

- (i) preventing an unwarranted resort to retrenchment;
- (ii) cushioning workers from the economic effects of losing a job through compensation; and
- (iii) encouraging workers to accept retrenchment in desirable circumstances.⁸

The lack of certainty over what retrenchment law is designed to achieve has led to some questionable decisions by Zimbabwean courts. In *Continental Fashions (Pvt) Ltd v Mupfuriri & Ors*⁹, the Supreme Court failed to grasp the clear difference between the objectives of retrenchment as an economic concept and the objects of retrenchment law. In that case, the Supreme Court held that where retrenchment is aimed at avoiding liquidation, the ability of the company to pay a proposed retrenchment package is the ultimate criterion in determining whether or not that package is reasonable. While it may be true that where retrenchment is designed to ‘avoid the collapse and liquidation of the company’, the ability of the company to pay is an important factor, it does not follow that this is the ultimate consideration, because retrenchment law has a different compass, namely striking a balance between the two competing interests of employer and employee.

However, some cases have shown a commendable grasp of the rationale of retrenchment law. In *Chidziva & Ors v ZISCO Ltd*,¹⁰ Muchechedere JA noted:

It should be borne in mind that the clear and broad intention of the said Regulations was to prevent unnecessary and whole-

⁷ Collins, op.cit. p.157.

⁸ See generally Collins, op.cit; Honeyball and Bowers (1992) pp.184-6.

⁹ 1997 (2) ZLR 405 (S).

¹⁰ *supra*.

*sale retrenchments of employees by employers. And where retrenchment had been justified to ensure that this had to be done in a fair and transparent manner taking into account all the personal circumstances of the persons to be affected. In the case where a large number of employees, such as in the present case, was to be retrenched there is greater need for the strict compliance with the said Regulations because the lives of many people who had spent most of their working lives with the respondent was at stake.*¹¹

In *Flexible Packaging (Pvt) Ltd v Zacharia Mushonga*¹² the Supreme Court adopted this author's summary of the rationale of retrenchment law in the following words:

*The regulations were designed to strike a balance between the competing interests of the employers and workers with a view to preventing an unwarranted resort to retrenchment, cushioning workers from the economic effects of losing a job through compensation and the encouraging of workers to accept retrenchment in desirable circumstances.*¹³

History and sources of retrenchment law in Zimbabwe

The common law knows no retrenchment. Termination of employment on notice is acceptable under the common law, whether the reason be economic considerations or otherwise. Retrenchment is therefore a matter of labour legislation. The Master and Servants Act,¹⁴ which governed individual employment law in Zimbabwe from 1901 to 1980, did not have any provisions on retrenchment. It was repealed by the Employment Act,¹⁵ but this latter Act also had no provisions on retrenchment, and the common law continued to apply. The 1980 Minimum Wages Act¹⁶ specifically prohibited an employer from terminating the services of an employee 'solely on the ground of a requirement to pay him a minimum wage'.¹⁷ This effectively outlawed any retrenchment on the

11 At 380D.

12 SC 72/2000.

13 At p.4. The Supreme Court was relying on Madhuku (2000) pp. 9-11.

14 Act 4 of 1901.

15 Act No. 13 of 1980.

16 Act No 4 of 1980.

17 Section 7 (1) of the Act.

sole basis of failure to pay a minimum wage and this may be taken as the first inroad into the wide ambit given by the common law over dismissals on notice. A more direct regulation of retrenchment had to wait for the enactment of the Labour Relations Act.¹⁸ The Act itself did not contain any provisions on retrenchment but empowered the Minister to make regulations on a variety of matters, including retrenchment.¹⁹ The first such regulations made by the Minister were the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations.²⁰ Section 4(1) of the regulations provided:

No employer shall...

(a) impose work on a short-time basis on; or

(b) lay-off or retrench;

any employee or group or class of employees without the prior written approval of the Minister.

Except for the further requirement that the Minister had to consult the appropriate trade union and the employers' organization before granting the approval to retrench,²¹ the regulations had no other details such as the procedure to be followed, any notice period before retrenchment for retrenchment packages payable. All such aspects were presumably left to the Minister. With the advent of the economic structural adjustment programme in 1990 and in the face of more widespread retrenchments, the above provisions were repealed by SI 400/1990, and more detailed regulations were gazetted on the same day as the repeal.²² The regulations were amended twice before they were repealed in 2003 after provisions on retrenchment had been put into the Act itself in sections 12C and 12D. Because section 12C of the Act regulates the retrenchment of five or more employees within a period of six months, the Minister promulgated regulations governing the retrenchment of less than five employees.²³

18 Act No. 16 of 1985.

19 Section 17 (3).

20 SI 371/1985.

21 Section 4(3).

22 The regulations are the Labour Relations (Retrenchment) Regulations, 1990, SI 404/1990, gazetted on 21 December 1990.

23 Labour Relations (Retrenchment) Regulations, 2003, SI 186/2003..

What is retrenchment?

The Labour Act defines ‘retrench’ as follows:

*In relation to an employee, means terminate the employee’s employment for the purpose of reducing expenditure or costs, adapting to technological change, reorganising the undertaking in which the employee is or was employed, or for similar reasons and includes the termination of employment on account of the closure of the enterprise in which the employee is employed.*²⁴

Although this definition had been in the 1990 regulations which preceded its inclusion in the Act²⁵, it is shocking to read McNally JA in *Continental Fashions (Pvt) Ltd v Mupfuriri*²⁶ saying:

*Retrenchment, when used in the context of labour relations, means a cutting back of expenditure on the employment of workers by reducing their number. (The definition is mine. There is none in the Regulations).*²⁷

The definition of ‘retrench’ in the Labour Act shows that retrenchment in our context covers most conceivable forms of economic dismissals – those involving reorganization, closing down, technological changes and saving costs. What makes a termination a ‘retrenchment’ is the reason for it. If the reason for a termination is one of those specified in the definition, that termination is a retrenchment within the scope of the Labour Act. It would appear that the reference in the definition to the ‘purpose of reducing expenditure’ means that an employer may retrench simply to increase profits.²⁸ Obviously, it is permissible for a court to go behind the purported reasons given by an employer if there is a basis to suspect that the employer is seeking to circumvent retrenchment law. The best illustration of this is the case of *Mutare Board & Paper Mills (Pvt) Ltd v Kodzanai*.²⁹ In that case, the employer, after deciding to reduce its workforce

²⁴ Section 2.

²⁵ SI 404/1990.

²⁶ *Supra*.

²⁷ See p. 407 E.

²⁸ See *Food & Allied Workers Union & Others v Kellogg SA (Pty) Ltd* (1993) 14 ILJ 406 (IC) at 413A.

²⁹ 2000 (1) ZLR 641 (S).

as a cost-cutting measure, resorted to its pension fund regulations and retired all its male employees who were 55 years of age or over. This was challenged by one of the employees who filed a High Court application arguing that the so-called early retirement was for all intents and purposes a retrenchment and thus sought an order declaring the process invalid for failing to comply with the Retrenchment regulations. The Supreme Court agreed. It held that although an employer has a right to resort to termination by retirement, this right does not exist where the effect of the employer's action is to retrench. In the words of Gubbay CJ:

*... the right to require early retirement remains exercisable, but is curtailed by the requirement that whenever exercised it must not amount to, or be used to effect, a retrenchment.*³⁰

Each case will depend on its own facts. In that particular case, the court laid emphasis on the fact that a large number of employees of the same class were suddenly and simultaneously required to proceed on 'early retirement' and the reason given was the need to reduce the strength of the workforce.

The sale of shares in a company leading to new shareholders does not amount to re-organization within the contemplation of the definition of 'retrench'.³¹ This is because a company is a separate legal *persona* and the identity of the shareholders, in itself, had no effect on the structure of the company. If a termination is not for purposes specified in the definition, it is not a retrenchment.³² In *NEI Zimbabwe (Pvt) Ltd v Zane Brown & Ten Others*,³³ the shareholders of the appellant company sold their entire shareholding to senior management staff. The respondents and other employees did not believe that the future of the company was secure with the new shareholders. They demanded their 'retrenchment' by what they considered to be their previous employer, that is, the previous shareholders. Eventually an agreement was entered into between the company and the respondents in terms of which their employment was terminated on payment of certain sums of money. The employees signed letters of resignation. After a while, the respondents alleged unlawful retrenchment. The employer took the view that it had been voluntary resignation.

30 At p. 645E.

31 *NEI Zimbabwe (Pvt) Ltd v Zane Brown & Ors* SC 84/2004

32 *Supra*.

33 SC 84/2004

The employees won all the way to the Labour Court. In the Supreme Court the employer won. It was held that there was no retrenchment because, on the evidence, it was the employees, not the employer, that sought termination and for purposes that had nothing to do with the circumstances specified in the definition of retrenchment. Termination in a retrenchment exercise must be by the employer.

A common disguised mode of circumventing retrenchment legislation is the so-called 'voluntary retrenchment', whereby employees are claimed to have voluntarily resigned and opted for a package. Although the Supreme Court, by a majority of two to one, fell for this trick in *Retrenched Employees of National Breweries Ltd v National Breweries Ltd & Anor*,³⁴ it is clear that the majority was wrong and there is no such thing as voluntary retrenchment. Every retrenchment must be in accordance with the procedures set out in legislation. In that case, the employer made it clear, through two memoranda to its employees, that it was restructuring and some of its employees would be retrenched. On 19 January 1999, it advised employees not accommodated in its new structure that they would be retrenched on 30 April 1999, but the employer was offering a voluntary retrenchment package. About 368 employees, whose employment was to be terminated on 30 April 1999, were asked to apply for a voluntary retrenchment package by completing an application form, which was in the form of a letter prepared by the employer:

Dear Sir

APPLICATION FOR VOLUNTARY RETRENCHMENT

I,, acknowledge receipt of your memorandum of 19 February, 1999, which I have read and fully understood. I therefore wish to be considered for voluntary retrenchment on the Voluntary Retrenchment Package offered by the company.

Subject to the acceptance of my application by Management, I hereby freely tender my resignation from National Breweries with effect from 1 May 1999.

Yours faithfully

34 2003 (1) ZLR 263 (S).

.....
Approved/Declined by Management

In a majority judgment authored by Cheda JA, the Supreme Court characterized the situation as a resignation and not a retrenchment. Cheda JA said:

Even if initially the employer intended to retrench but failed to follow the laid down procedures, once the employees concerned decided to resign, the need to follow the retrenchment steps fell away.³⁵

This is plainly wrong. The so-called resignations were, in the circumstances, not genuine. It was a clear case of a retrenchment outside the law. This point is aptly made by Sandura JA in his dissenting judgment:

In view of the purpose of the Regulations, if what the employer wants to do is to retrench his employee or employees he is obliged to follow the procedure set out in the Regulations. He cannot circumvent that procedure by resorting to some other device...

It is common cause that a decision had been taken by Natbrew that those employees who had been identified as no longer needed by the company... were to be retrenched on 30 April 1999, whether they liked it or not. That decision was taken long before the appellant signed the document in question 'applying' for the voluntary retrenchment package and tendering his resignation. Quite clearly, the document was a smokescreen designed to disguise Natbrew's unlawful retrenchment exercise.³⁶

An attempt was made in the South African case of *Hlongwane & Anor v Plastix (Pty) Ltd*³⁷ to distinguish between 'retrenchment' and 'redundancy' with the former being a dismissal on the basis that the employee has become superfluous due to an economic downturn and the latter covering dismissals due to technological changes or reorganization.³⁸ This distinction is not helpful. In Zimbabwe, the definition is wide enough to

35 At p. 266A.

36 At pp. 270F and 272(D).

37 (1990) 11 ILJ 171 (IC).

38 See the reference to the case in Grogan (1998) p.159.

cover both situations as retrenchment.

It is not clear whether termination for purposes of the sale or transfer of a business can be characterized as a retrenchment under the Labour Act. Under the common law, a purchaser of a business is under no obligation to continue with employment contracts of the existing employees, save that the employee can sue the old employer for constructive dismissal, the sale of the business being taken as a repudiatory breach of the contract of employment.³⁹ Section 16 of the Labour Act alters this common law position by deeming the contracts of employment to be transferred to the purchaser on terms and conditions which are not less favourable than those applicable to the employees at the time of the sale or transfer. It is submitted that section 16 does not affect the question of whether or not a termination of employment to facilitate a sale or transfer of business is a retrenchment. It is a retrenchment on the basis of either being a 'closure' within the contemplation of the definition or as being 'similar' to a 'closure'. If there is no termination of employment prior to a sale or transfer and the new owner decides to terminate the employment of the employees inherited, for purposes of reorganization, there is a retrenchment regardless of the length of time the employees have served the new owner.

Termination of employment by operation of law, such as termination of employees' contracts on liquidation in terms of section 103 of the Insolvency Act [Chapter 6:04], is not a retrenchment even if a large group of employees is affected.⁴⁰

Retrenchment Procedure

The retrenchment procedure depends on the number of employees involved. If the employer is retrenching five or more employees within six months, the procedure is in section 12C of the Act. If it is less than five, the procedure is found in SI 186/2003.

Retrenching five or more employees within six months

The main effect of section 12C is to impose a mandatory procedure for the retrenchment process. The Supreme Court has held, emphatically, that any purported retrenchment not in compliance with the Act is nul

39 See *Nokes v Doncaster Amalgamated Collieries* (1940) 3 All ER 549 (HL).

40 See *Merlin Ex-Workers v Merlin Ltd* SC 4/2001.

and void.⁴¹ In *Chidziva & Ors v Zisco*,⁴² Muchechetere JA expressed this as follows:

*In the circumstances, I agree with the submission that the retrenchment exercise was improper. It was carried out in contravention of the provisions of the said Regulations. It was therefore illegal and void.*⁴³

The effect of the retrenchment being null and void is that the employees are regarded as still being employed, with the consequent obligation of the employer to pay them wages.⁴⁴

In *Chidziva & Ors v ZISCO*,⁴⁵ the Supreme Court introduced the concept of waiver as follows: notwithstanding the fact that the retrenchment procedure has not been followed, employees who accept retrenchment packages may be taken to have waived the right to object to the procedural irregularities. In other words, a retrenchment will be regarded as valid even where the provisions of the Act or regulations have not been complied with, if the employees accept their retrenchment packages in circumstances where such acceptance will be held to be a waiver.

The use of the concept of waiver in this context is problematic. Waiver requires full knowledge of the legal rights being abandoned. Most workers involved in retrenchment disputes would not take the acceptance of a retrenchment package as an abandonment of any rights they may have to challenge the retrenchment. The views expressed in the minority judgment of Muchechetere JA in *Chidziva* are worth reproducing:

In considering this question of waiver sight must not be lost of the fact that the retrenchment packages were presented to the appellants as a fait accompli to persons who were not financially able to pass up the respondent's offer. And as submitted by Mr Morris, given the high cost of litigation, the real difficulties experienced in finding alternative employment, and the fact that the appellants are laymen unversed in the

41 See *Kadir & Sons (Pvt) Ltd v Panganai & Anor* 1996 (1) ZLR 598 (S); *Chidziva & Ors v ZISCO* 1997 (2) ZLR 368 (S).

42 *Supra*.

43 At p. 378B.

44 See generally *Kadir and Sons (Pvt) Ltd v Panganai & Anor* 1996 (1) ZLR 598(S) at 604.

45 1997 (2) ZLR 368 (S).

*provision of the law of contract, it was not unreasonable for the appellants to take retrenchment packages.*⁴⁶

An employer who realizes that the retrenchment was unlawful may reinstate the employees with full pay and benefits and re-institute fresh retrenchment proceedings.

In *Flexible Packaging (Pvt) Ltd v Zacharias Chinyani Mushonga*,⁴⁷ the company had written to the Ministry of Labour seeking approval of retrenchment without notifying the employees concerned. The Ministry purported to authorize the retrenchment. It was held that the retrenchment was null and void as the procedures laid down in the regulations had not been followed. The company had argued that although the regulations had not been followed, there had been some negotiations between the parties and this amounted to substantial compliance. This argument was rejected on the basis that substantial compliance did not suffice in retrenchment matters.

Even where the failure to comply with the retrenchment legislation is not attributable to the employer, such as where non-compliance is by the works council or the Retrenchment Board or the Minister, the purported retrenchment is a nullity.⁴⁸ In *Stanbic Bank Zimbabwe Ltd v Charamba*,⁴⁹ there was neither a works council nor an employment council for managerial employees and so the notice to retrench was sent to the then retrenchment committee. The committee did not act forthwith as required by the legislation. It took 37 days after receiving the notice to hold a meeting at which the parties made their submissions. The retrenchment committee also failed to perform its role as a mediator. It took nearly six months to make its recommendations to the Minister, who, on his part, also took over a month to reach a decision in which he approved the retrenchment. The retrenchment was declared a nullity for failure to comply with the peremptory provisions of the retrenchment legislation.

The process involved in retrenchment is as follows:

1. The employer wishing to retrench must first give written notice of the intention to retrench to either the works council or, where there is no works council, to the employment council.⁵⁰ However, even where a

46 At p. 380C.

47 SC 72/2000.

48 *Stanbic Bank Zimbabwe Ltd v Charamba* 2006 (1) ZLR 96 (S).

49 Ibid.

50 Section 12C (1)(a).

works council exists, if the majority of the employees being proposed for retrenchment agree, the notice may be given to the employment council instead of the works council.⁵¹ In the unlikely situation that there is neither a works council nor an employment council for the undertaking concerned, the written notice shall be given to the Retrenchment Board set up in terms of the retrenchment regulations.⁵²

2. The written notice is required to give details of the reasons for the retrenchment and the names of all employees being proposed for retrenchment. It is mandatory that the notice contains the names of all the proposed employees. The employer cannot withhold the names even where he or she strongly feels that the release of the names might be premature or sensitive.⁵³ The rationale for this appears to be to enable the workers concerned to consult or seek advice or even seek alternative employment, given that the selection of employees for retrenchment may itself be subject to bargaining. The sending of the notice has no legal effect on the employment contracts of the employees concerned. They remain employees until the retrenchment has been approved. Gubbay CJ made this point clear in *Kadir & Sons (Pvt) Ltd v Panganai*:

*It is clear to me that until the critical stage of the Minister's decision has been reached, the employees whom the employer proposes to retrench remain on the pay-roll. They have not been retrenched. The fact that in the interim period the employer may have ceased to operate the business does not rid him of the legal obligation to pay the employees their wages.*⁵⁴

Whenever notice is given to either the works council or employment council, a copy must be sent to the Retrenchment Board.⁵⁵

3 The notice must be given by the employer. There have been cases where there is a misconception as to who the employer is. An illustration is the case of *Nkomo & Ors v Rubber & Allied Products (Pvt) Ltd & Anor*.⁵⁶ The appellants were employed by Rubber & Allied Products,

51 Section 12C(1)(a)(ii).

52 See the definition of 'Retrechment Board' in section 2 of the Labour Act .

53 See *Chidziva & Ors v ZISCO* (*supra*).

54 P. 604C. See also *Chipunza & Ors v Beverley Building Society* 2002 (2) ZLR 231 (H).

55 Section 12C(1)(C).

56 2002 (1) ZLR 428 (S).

which decided to sell its assets and business to Dunlop Zimbabwe Ltd. The appellants could not be absorbed by Dunlop Zimbabwe Ltd and so Rubber & Allied Products decided to retrench them. On 28 June 1999, it gave the requisite notice of the proposed retrenchment to the works council. On 1 July 1999 (three days after the notice) its business and assets were sold and transferred to Dunlop Zimbabwe. However, the retrenchment processes continued at the instance of Rubber & Allied Products. When the parties failed to reach agreement and litigation ensued, the matter reached the Supreme Court. The Supreme Court applied section 16, which says that whenever any undertaking is alienated or transferred, employees are deemed to be transferred as well. The legal effect of section 16 was that on 1 July 1999, the appellants became employees of Dunlop Zimbabwe and Rubber & Allied Products ceased to be the employer. Accordingly, the written notice of the intention to retrench fell away on 1 July 1999 when Rubber & Allied Products ceased to be the employer.

4. On receipt of the notice from the employer, the authority in question (works council, employment council, Retrenchment Board or person appointed by the Retrenchment Board⁵⁷ as the case may be) is required, within a maximum period of one month, to ‘attempt to secure agreement between the employer and employees concerned, or their representatives, as to whether or not the employees should be retrenched and, if they are to be retrenched, the terms and conditions on which they may be retrenched’. Where, in the absence of both a works council and an employment council, notice is sent to the Retrenchment Board, it must be stressed that the latter must, like a works council or employment council, perform the role of a mediator and play that role actively and not passively.⁵⁸

On receipt of the notice, the relevant authority must act ‘forthwith’. In *Stanbic Bank Zimbabwe Ltd v Charamba*,⁵⁹ the Supreme Court interpreted ‘forthwith’ in retrenchment legislation as having the meaning giv-

57 As already noted, in cases where, there is neither a works council nor an employment council, notice is sent to the Retrenchment Board. However, the Retrenchment Board is entitled to authorize some other person to act as an authority on its behalf: section 12C(1)(a)(iii).

58 *Stanbic Bank Zimbabwe v Charamba* 2006 (1) ZLR 96 (S).

59 Ibid.

en by the court in *Standard Chartered Bank Zimbabwe Ltd v Matsika*,⁶⁰ namely ‘as soon as is reasonably possible in the circumstances’. Given that the authority has up to one month to secure an agreement, ‘forthwith’ means acting within a matter of days.

The role of the works council has been the subject of case law. The works council is defined as ‘a council composed of an equal number of representatives of an employer and representatives drawn from members of a workers’ committee’.⁶¹

In *The Late K.C Matema & Ors v Zimoco*⁶² it was established that at the meeting of the works council that approved retrenchments, there had been more workers’ committee members than representatives of management. The workers sought to have the retrenchment set aside on the basis that the works council was improperly constituted. This was rejected by the Supreme Court as follows:

*... the stipulation in the regulations that there should be equality of employer and employee representatives is a provision purely for the benefit of employees. Accordingly, it can never have been the intention of the Legislature that it could lie in the mouth of one of the two sets of protagonists to complain that the other protagonist was under-represented... it is such a glaring absurdity that it could never have been intended. In the circumstances, the fact that the workers representatives were more than those of the employer did not constitute a breach of the regulations.*⁶³

Given the fact that both the works council and the employment council are composed of equal numbers of workers and employer representatives, does the role of these entities end with merely acting as mediators and leaving the agreement to be struck between the employer and the employees concerned or should agreements within works councils or employment councils themselves not be sufficient? Put differently, once a notice to retrench has been received by the authority (works council or employment council), is it not competent for the authority to rely on its

60 1996 (1) ZLR 123 (S).

61 See section 2 of the Labour Relations (Workers Committees) (General) Regulations, 1985; SI372/1985. See section 2 of the Labour Act.

62 SC 118/1999.

63 At pp. 4-5.

bipartite membership to bargain over and, where possible, reach agreement on the retrenchment?

These issues were addressed by Muchechetere JA in *Chidziva & Ors v ZISCO Ltd*.⁶⁴ He held that the legislation referred to three parties: the authority, the employer and the employees concerned or their representatives. It followed that the authority is independent, with the sole role of being a mediator or facilitator, and an agreement of its members cannot be taken to be an agreement of the employer and employees concerned. More fundamentally, workers on the works council are not to be regarded as representing the interests of workers to be retrenched. He made the point in the following words:

*I am of the view that workers' representatives on the works council had neither the statutory authority nor the mandate to represent the workers who were facing retrenchment. As I have already indicated above, they were appointed on the works council as representatives of all the workers but once appointed they became part of the council and separate from the workers.*⁶⁵

Muchechetere JA was not breaking new ground. The same views had been expressed by Bartlett J in *Barry Thomas Prosser & Ors v ZISCO*,⁶⁶ where he noted:

*The works council effectively in terms of section 3(2) was supposed to act in some respects as a mediator between the employer and the employees (or their representatives) to try and decide whether there should be retrenchment and if so on what terms and conditions. It accordingly would not be possible for the managerial members of the works council to wear two hats, one as members of the works council trying to secure an agreement and the other as the representatives of the persons about to be retrenched.*⁶⁷

In *Nyangoni & Ors v Zimbabwe Development Corporation & Ors*,⁶⁸ the Supreme Court reiterated the separate nature of the works council

⁶⁴ *Supra*, 1997 (2) ZLR 368 (S).

⁶⁵ At p. 376G.

⁶⁶ HH 201/1993.

⁶⁷ At pp. 7-8 of cyclostyled judgment.

⁶⁸ 2001 (1) ZLR 1 (S).

and suggested how it could operate. It could first discuss and agree on the issues such as the employees to be retrenched and the appropriate retrenchment package and thereafter attempt to have that accepted by the employer and the employees concerned. The agreement of the works council is not automatically binding on the parties. However, the agreement arrived at in the works council can be binding on the parties provided both groups had given prior consent to be bound by the decision. In the words of Muchecheitere JA:

*... it can only arise where it can be shown that before the agreement was arrived at the workers' representatives on the works council had a mandate from the employees to be retrenched to bind them and similarly that the employers' representatives also had a mandate to bind the employer.*⁶⁹

It must be emphasized that the suggestion that the works council may first reach an agreement among its members and thereafter approach the employer and the employees concerned is just that – a suggested approach. It is not what the law dictates. The law makes the works council a mediator and there are countless methods at its disposal, the suggestion by the Supreme Court being one of them.

The Supreme Court had occasion to repeat emphasis of the legal position that an agreement reached in the works council does not, without more, bind the respective parties, in *Fungura & Anor v Zimnat Insurance Co. Ltd.*⁷⁰ In that case, the court overruled Gillespie J's view, in the court *a quo*,⁷¹ that the works council can both agree within itself and at the same time bind the respective parties. The court went further to hold that the majority of the employees to be retrenched cannot bind the minority regarding whether or not a retrenchment package is acceptable. This means that the works council must get every employee or their representative to agree to the proposed package. In the words of Muchecheitere JA:

*If it fails even with one person, then it has got to refer the matter to the retrenchment committee in terms of section 5(6) of the Regulations.*⁷²

The features of section 12C which support the approach of the Su-

69 At p. 8. See also the High Court decision in the same matter HH 34/1998.

70 2001 (1) ZLR 412 (S).

71 See *Fungura & Anor v Zimnat Insurance Co. Ltd* 2000 (1) ZLR 379 (H).

72 At p. 8.

preme Court are (i) the express words which specify the duty of the authority being 'to secure agreement between the employer and employees concerned',⁷³ and (ii) the emphasis on the concept of the 'employees concerned', suggesting that they have to be treated as a distinct entity. An example of the latter emphasis is in section 12C(1)(a)(ii) where it is provided that it is only a 'majority of the employees concerned' who can decide that the written notice of retrenchment be sent to an employment council instead of a works council.

It is submitted that this should not be taken as overruling Gillespie J's view in the court *a quo* where he held that 'individuals amongst the body of workers who dissent to the package properly agreed by authorized representatives will nevertheless be bound by the will of the majority so represented.'⁷⁴ Two situations must be distinguished. The first is where the employees to be retrenched have not elected or appointed representatives to represent them as a group. In that situation, each employee to be retrenched has to agree to the proposed package and this is the situation covered by the Supreme Court judgment. The second is where the employees to be retrenched have agreed among themselves to designate representatives to represent them in the negotiation process. In such a case, as long as the individual employee agreed to the appointment of representatives, he or she cannot dissent to the package agreed by the authorized representatives if the majority of employees so represented consent to the package. This is the situation covered by Gillespie J in the *Fungura* case (*supra*) and is good law. What has to be added, however, is that an employee to be retrenched cannot be bound by the majority in the initial phase of deciding whether or not to elect or appoint representatives. He or she is entitled to say, 'I will either represent myself or choose my own representative.' But once the employee has voluntarily agreed to the appointment or election of representatives, then he or she is bound by the will of the majority.

The Supreme Court in *Fungura* case (*supra*) also sought to restrict the scope of the circumstances in which a works council agreement may be binding on the parties by opining *obiter* that where it is alleged that prior consent was given, it must be shown that the consent was clear and unequivocal and that it was in the full knowledge that rights were being

⁷³ See section 3 (2) of the Regulations.

⁷⁴ At p. 385 F.

waived in the process.⁷⁵

This interpretation of retrenchment legislation on the role of works councils and employment councils demolishes a practice in industry, namely the use of the works council or employment council as the negotiating forum whereby the agreement of members of the council is taken to be the agreement between the employer and the employees to be retrenched.

The practice in industry has a solid foundation at a conceptual level. The structure of the works council follows that of an employment council, where the equal numbers of employer and employee representatives is designed to make the institution a bargaining chamber. The basic philosophy is that of ‘representative democracy’, where each party consults its constituency before and during the negotiations until an agreement acceptable to both parties is struck. In principle, an agreement of members of the works council or employment council, arrived at after constant consultations during the period of negotiations, translates into an agreement of the employer and the employees concerned. Further, to use the works council as a structure merely for mediation is both nonsensical and unrealistic. It is nonsensical because one does not need a bipartite body for mediation: in mediation, the parties are not bound by the advice of the mediator. It is unrealistic because it is difficult to imagine how the mediation should proceed: are the workers on the works council expected to persuade the employer? Or is the works council itself expected to debate the proposals, arrive at some agreed position and then use that position as a guide to its mediation role?

More fundamentally, to use the works council as a mediator leads to a glaring absurdity in one critical respect. Whereas it is possible to separate worker representatives on the works council from the employees proposed for retrenchment, it is absurd to separate ‘employer representatives’ on the works council from the employer. Employer representatives on the works council are almost invariably the managers or directors who represent the employer in or outside the works council, so that there is no employer outside the works council with whom a mediation can happen. Further, the use of the works council or employment council merely as a mediator means that the workers’ committee or trade union, as the case may be, is disempowered, and this may have serious implications for

75 At p. 419.

worker organizations. This is because, according to the interpretation, employees proposed for retrenchment have no access to assistance by the workers' committee, whose members are by definition the only persons who qualify to be members of the works council. This may require the creation of an alternative worker leadership for purposes of retrenchment disputes because the workers' committee is virtually impotent in a retrenchment dispute.

A serious weakness of the negotiation process is that there is no legislative basis for employees about to be retrenched to demand full financial disclosure by the employer. This was clearly illustrated in *Continental Fashions (Pvt) Ltd v Mupfururi & Ors*⁷⁶ where employees relied on section 76 of the Labour Act to demand full financial disclosure. This was rejected by the Supreme Court on the basis that section 76 only applied to collective bargaining and not to retrenchment.

5. What happens in situations where the works council is unable to function due to deadlocks or disputes among its members?

The works council contemplated in retrenchment legislation is one which is properly constituted and is able to function. If the works council is unable to function, such as where members of the workers' committee refuse to participate in its activities, there is 'no works council' within the contemplation of the legislation. In that situation, the employer may send a new notice of the intention to retrench to either the employment council or the Retrenchment Board in terms of section 12C(1)(a)(ii) or 12C (1) (a)(iii), as the case may be.

6. If an agreement is 'secured' on (i) that there be retrenchment and (ii) the terms and conditions of it, the authority shall send a written approval to the employer concerned.⁷⁷ A copy of the approval is required to be sent to the Retrenchment Board.⁷⁸ Clearly, the sending of the copy of the approval to the Retrenchment Board is merely for record purposes: the Retrenchment Board has no power whatsoever to interfere with the agreement, even where it might appear to the Board that its terms are unfair to one of the parties. An important point to note is that section 12C imposes a time limit within which the agreement must be secured. This should be within one month,⁷⁹ and the works council has no jurisdiction

76 1997 (2) ZLR 405 (S)

77 Section 12C(3)(a).

78 Section 12C(3)(b).

79 Section 12C(3).

to approve a retrenchment where an agreement for it has been secured outside the one-month period. However, this does not mean that such an agreement is entirely useless: it may be taken into account by the Retrenchment Board at the next stage of the process.

The works council has no discretion on the issue of approving an agreement. If an agreement on the two issues is reached, it must be approved. The role of the works council is merely to satisfy itself that there is an agreement on the two issues and that it is genuine. If that is the case, *cadit quaestio*. The approval is therefore a certification of the genuineness of the agreement on the two issues and not of its goodness or fairness.

It is not mandatory that the agreement between the employer and the employees concerned be facilitated by the works council. They may reach an agreement on their own prior to the employer's giving of notice and in that event, the role of the works council is merely to satisfy itself that the agreement is genuine and that it covers the issues in section 12C(2).⁸⁰ If so satisfied, the works council must cause the parties to confirm their agreement and then give its written approval of the retrenchment. Malaba JA (as he then was) endorsed this approach in *Mugabe & Ors v Zvimba Rural District Council*⁸¹ as follows:

*In this case, the representatives of the employer and employees concerned reached an agreement on the retrenchment and its terms and conditions without the involvement of the works council. The works council which was required by law to approve the retrenchment in terms of the agreement did so.*⁸²

7. If no agreement is secured within one month of the serving of notice to the authority, the matter is referred to the Retrenchment Board.⁸³ The reference to the Retrenchment Board consists of (i) a written notice of the disagreement (ii) copies of all the documents which the employer and employees concerned may have submitted to the authority and (iii) copies of the minutes of any proceedings and deliberations. The Retrenchment Board is established in terms of section 4 of the Retrenchment regu-

80 *Mugabe & Ors v Zvimba RDC* 2006 (2) ZLR 84 (S).

81 *Ibid.*

82 At pp. 89H-90A.

83 Section 12C(4).

lations⁸⁴ and has a tripartite composition: four Government representatives, two workers' representatives and two employers' representatives.

The function of the Board is to consider the proposed retrenchment and recommend to the Minister of Labour whether or not the retrenchment should be approved. Although section 12C(7) provides that the 'Retrenchment Board may, in its discretion, invite and receive representations, whether oral or written, from any 'interested parties', it is submitted that this does not oust the general principles of natural justice, particularly the *audi alteram partem* rule. Accordingly, the parties to the retrenchment dispute have a right to be heard, particularly given the fact that the Board is statutorily obliged to consider a variety of factors specified in section 12C(1-1), almost all of which cannot be satisfactorily considered without hearing the parties. The Board is required to make its recommendations within two weeks,⁸⁵ failing which the Minister is obliged to make his or her decision as if the Board had made a recommendation.⁸⁶ If the Retrenchment Board, fails to act within the stipulated time and the Minister has not intervened to act in terms of section 12C(8) and 12C(9), any interested party is entitled to apply to the High Court for an order directing the Minister to act.⁸⁷

8. The recommendations of the Retrenchment Board are made to the Minister, who in terms of section 12C(9) is required not only to consider them but to also have regard to the factors in section 12C(9), and then make a decision either approving or refusing the proposed retrenchment. As already noted, the Minister is also required to act in terms of section 12C(9) if the Retrenchment Board fails to make its recommendations within the two week period specified in the Act. It has been held that the Minister need not sign the official letter communicating his or her decision – what matters is that he or she should make the decision.⁸⁸ Amendments introduced in 2005 removed a two-week time limit within which the Minister was to act. Patel J generously defended the removal of time limits as follows:

They were obviously designed to remove the time constraints imposed upon the Minister in the decision-making process

84 SI 186/2003.

85 Section 12C(6).

86 Section 12C(8).

87 See *Suns Manufacturers v Retrenched Employees* SC 120/1999.

88 See *Mashave & Ors v Zupco & Anor* SC 24/2000.

*and thereby avoid the potential inequities that might flow from the hurried exercise of his or her discretion.*⁸⁹

The real reason for removing the two-week time limit appears to be irritation with deadlines.⁹⁰

A question which may arise is: are the parties entitled to be heard by the Minister? The answer depends on the view one takes of the entire scheme of section 12C and the Regulations. It is submitted that, given the composition of the Retrenchment Board, the Minister is, in general, expected to accept its recommendations and only reject or change them where there is an obvious misdirection. This should be so because the tripartite nature of the Retrenchment Board places it in a better position than the Minister to weigh the factors specified in section 12C(11). Given this role for the Minister, it is not necessary, when he or she is considering the recommendations of the Retrenchment Board, to give a hearing to the parties. A hearing before the Minister, apart from being impracticable, also renders the Retrenchment Board redundant, a result which could never have been intended. The position would be different where the Minister is acting without the benefit of the recommendations of the Retrenchment Board in terms of section 12C(8). In such a case, the parties must be given an opportunity to be heard, but the circumstances of impracticability of organizing oral hearings before the Minister suggest that an oral hearing is not required. It suffices for the Minister to consider written submissions from the parties.

In *Zindoga & Ors v Minister of Public Service, Labour and Social Welfare & Anor*⁹¹ the issue of the right to be heard by the Minister was raised. The relevant provisions of section 12C at the time imposed a time limit of 14 days within which the Minister had to make his or her decision. Patel J held that the right to be heard by the Minister was not available in view of the two-week time frame. He had this to say:

89 *Zindoga & Ors v Minister of Public Service, Labour and Social Welfare & Anor* 2006 (2) ZLR 10 (H) at 15F.

90 *See Beverley Building Society v Minister of Labour* 2002 (2) ZLR 241 (H) where the Minister had been taken to court on an application to have him committed to prison for contempt of court after failing to act within a 14-day time limit directed by an order of court. In *Stanbic Bank Zimbabwe v Charamba* 2006 (1) ZLR 96 (S) a retrenchment was nullified after the Retrenchment Board and the Minister, despite the two-week deadlines, took up to eight months to make a decision.

91 2006 (2) ZLR 10 (H).

What is clear, in any event, is that the Minister is bound by the two-week time frame stipulated by section 12C. What is also clear, given that specific time limit, is that the Minister is obliged to deal with the matter solely on the papers forwarded to him by the Board. He practically cannot be and consequently is not required to invite the interested parties to make further written or oral representations in the matter. Section 12C, taken as a whole, is framed so as to enable the efficient and expeditious handling of proposed retrenchments, having regard to the interests of employers and employees alike. The right to be heard, in terms of section 12C, is confined to the proceedings of the Board and does not, in my view, extend to the deliberations and decisions of the Minister.

I should note in passing that the position now may arguably be different following the amendment of section 12C. However, it is not necessary for me to make any pronouncements on the subject vis-à-vis the amended provisions of the section.⁹²

The weakness of this passage is that the judge does not make a distinction between the right to be heard and an oral hearing. An oral hearing is a mode of the exercise of the right to be heard. It is submitted that an oral hearing is not available as of right, notwithstanding the removal of the time limits. This is because of its impracticability. However, it is submitted that parties are entitled to make written submissions in all cases where the Minister seeks to act (without the benefit of recommendations of the Retrenchment Board) in terms of section 12C(8).

In *Kadir & Sons (Pvt) Ltd v Panganai & Anor*⁹³ the Supreme Court held that the Minister has no powers to approve a retrenchment retrospectively. In that case, the Minister, in approving retrenchment, had purported to backdate it. This is what the Supreme Court held to be unlawful. Gubbay CJ said:

It is clear to me that until the critical stage of the Minister's decision has been reached, the employees whom the employer proposes to retrench remain on the payroll. They

⁹² At pp. 16F-17A.

⁹³ 1996 (1) ZLR 598 (S).

*have not been retrenched. ...To backdate the retrenchment conflicts with the intendment of the Regulations. A contrary view would cause an injustice to employees who, awaiting the Minister's decision on whether or not they were to be retrenched, are obliged not to seek and obtain other employment.*⁹⁴

The Minister has power to order that his or her approval of the retrenchment be effective from a date in the future.⁹⁵

9. Once a retrenchment agreement between the parties has been secured and approved by the works council, or approval of the retrenchment has been granted by the Minister, as the case may be, the employees to be retrenched are entitled to be given the notice of termination to which they are entitled.⁹⁶ It must be emphasized that this notice only takes effect either after the Minister's decision or after approval by the works council following the securing of the agreement between the parties.⁹⁷ However, the notice need not be in writing.

It must be evident from the above description of retrenchment procedures that a distinctive feature of Zimbabwean law is that the final decision as to whether or not to retrench is not made by the employer. Either the employer agrees with the employees concerned and the agreement is approved or the Minister makes the final decision. In most countries, the employer has the final decision and this is supported by international labour standards as recorded by ILO Convention 158.⁹⁸ In South Africa, the legislation requires an exhaustive consultation process but the employer ultimately makes the decision whether or not to retrench.⁹⁹ The Zimbabwean approach provides a better protection to workers by undercutting the managerial prerogative while the employer's interests are safeguarded by the review procedure in the High Court.

Retrenching less than five employees

The procedure is governed by the Retrenchment Regulations, 2003 (SI

94 See p. 604.

95 See *Kadir & Sons (Pvt) Ltd v Panganai & Anor* 1996 (1) ZLR 598 (S).

96 Section 12C(5).

97 See *Kadir & Sons (Pvt) Ltd v Panganai & Anor* 1996 (1) ZLR 598 (S).

98 See Termination of Employment Convention, 1982 (No. 158). However, The Convention requires extensive consultations and that an impartial body be empowered to overturn the employer's decision in appropriate cases.

99 Section 189 of the Labour Relations Act, 1996.

186/2003). The procedure is similar to that applicable to the retrenchment of five or more employees except in three material respects. These are:

- (a) in retrenchments involving five or more employees, the employer may send the notice of its intention to retrench to the employment council even where a works council exists, if the majority of the employees concerned agree to such a course. There is no room for this course in retrenchments involving less than five employees. The notice of intention to retrench must be sent to the works council. It can only be sent to the employment council if there is no works council;¹⁰⁰
- (b) there is no requirement to send a copy of the notice of intention to retrench to the Retrenchment Board;
- (c) in retrenchments involving five or more employees, the notice of intention to retrench must be sent to the Retrenchment Board if there is neither a works council nor an employment council. The Retrenchment Board then performs the functions of the works council or employment council. For a retrenchment of less than five employees, the notice of intention to retrench must be sent to the employees concerned if there is neither a works council nor an employment council. The notice is also sent to the Retrenchment Board. There is no mediator between the parties and it is the duty of the employer to attempt to secure an agreement with the employees concerned.¹⁰¹

If the employer secures an agreement with the employees concerned regarding the fact that there should be retrenchment, and the terms and conditions thereof, the agreement must be signed by both the employer and all the employees concerned. The employer must thereafter 'send' a copy of the signed agreement to the Retrenchment Board. The procedure is completed the moment the employer sends the signed agreement to the Retrenchment Board. The signatures of all the employees concerned take the place of the approval of the works council or employment council in

100 Section 3(2)(a) of SI 186/2003.

101 Section 3(6)(b) of SI 186/2003.

retrenchments of five or more employees. As there is no involvement of a third party, the sending of the copy of the signed agreement to the Retrenchment Board is an integral component of the procedure and failure to send renders the process invalid. All that is required is evidence of sending. It is not a requirement that the signed copy be received or read.

Where no agreement has been secured with the employees concerned, the matter is referred to the Retrenchment Board, which shall deal with it in the same way as in matters involving five or more employees,¹⁰² namely, considering the matter and making recommendations to the Minister.

Voluntary Retrenchment

At strict law, there is no such thing as a voluntary retrenchment. Every retrenchment must comply with the procedures set out in legislation. Public policy requires that agreements on retrenchments be genuine and transparent. For that reason, where there is an agreement involving five or more employees it must be approved by a third party (the works council) and a copy sent to a governmental body (the Retrenchment Board). An agreement involving less than five employees must, at the very least, be sent to the Retrenchment Board.

What exists under the law is termination by mutual agreement. As already discussed, the agreement must be real.¹⁰³ The so-called ‘voluntary retrenchments’ which survive legal scrutiny, are those which succeed in being characterized as termination by mutual agreement.¹⁰⁴

Appeal or Review

Since 2003, there has been no right of appeal to the Labour Court or any other court against the Minister’s decision to approve or refuse a

102 Section 3 (5) and 3(8) of SI 186/2003.

103 See Chapter 6.

104 See for example *Retrenched Employees of Natbrew v Natbrew Ltd & Anor* 2003 (1) ZLR 263 (S) where Cheda JA said, ‘... if an employer and employee decide and agree to part, for whatever reasons, and the agreement is in writing, then retrenchment procedures fall away. There is no need to go through the steps laid down for retrenchment.’ (At p. 265G).

retrenchment, because there is no provision for an appeal in the Act.¹⁰⁵ However, the Minister's decision may be taken on review to the Labour Court in terms of section 89(1) or to the High Court.¹⁰⁶ To sustain an application for review, one or more of the usual grounds must be available. The three notorious grounds for review are: irrationality, illegality and procedural impropriety.¹⁰⁷ Where the Minister approves a retrenchment package which is close to what the employer offered, there can be no basis for sustaining the ground of gross unreasonableness in a review.¹⁰⁸

Before 2003, there was a right of appeal against the Minister's decision. The appeal lay to the then Labour Relations Tribunal.¹⁰⁹ The Regulations were silent on the effect of an appeal against the Minister's decision but the Supreme Court held that the noting of an appeal suspended the Minister's decision.¹¹⁰ In *Phiri & Ors v Industrial Steel & Pipe*¹¹¹ the Minister had approved retrenchment subject to a number of conditions, which included a retrenchment package of six months pay and two weeks pay for every completed year of service. The employer appealed against this decision to the Labour Relations Tribunal. Pending the hearing of the appeal, the workers instituted proceedings in the High Court contending that the noting of the appeal had the effect of suspending the Minister's determination and that they were therefore still employed and entitled to their salaries and benefits until the appeal was determined by the Labour Relations Tribunal.

Although the Supreme Court agreed that the effect of an appeal was to suspend the decision appealed against, the workers failed in their argument because the appeal was not against the Minister's approval of

105 Compare *Gwalazimba v PG Merchandising Ltd & Anor* 1993 (2) ZLR 215 (S) where the Labour Relations Tribunal purported to hear an appeal against the Minister's decision to approve termination of employment under the old SI 371/1985. As there was no provision for such an appeal, the proceedings of the Labour Relations Tribunal were declared a nullity.

106 See *Zindonga & Ors v Minister of Public Service, Labour & Social Welfare* 2006 (2) ZLR 10 (H).

107 See Chapter 12.

108 *African Gold Zimbabwe (Pvt) Ltd v A Dube and Ors* SC 42/2004.

109 See section 6(2) of the Retrenchment Regulations SI404/1990 as amended by SI 137/1994.

110 *Phiri & Ors v Industrial Steel and Pipe (Pvt) Ltd* 1996 (1) ZLR 45 (S).

111 *Ibid.*

retrenchment but related only to the retrenchment package. As the retrenchment itself had not been appealed against, it stood and therefore their employment had been terminated. The position of the law was therefore clear, namely that where an appeal was noted against the decision to retrench, workers remained on the payroll, and as long as they tendered their services, the employer was obliged to pay them their salaries and benefits until the appeal was determined.

Retrenchment Packages

Retrenchment legislation does not set out any minimum or recommended retrenchment packages. The furthest that Zimbabwean legislation goes is to require those involved in the retrenchment process (that is, an authority, Retrenchment Board or the Minister) to have regard to ‘the terminal benefits’ to which the proposed retrenchees will become entitled, before approving the retrenchment.¹¹² The absence of a legislative criterion for assessing retrenchment packages was severely criticized by McNally JA in *Continental Fashions* where he called upon the State to ‘make up its mind as to the extent to which it wishes to interfere with the operation of free market forces’.¹¹³

An example of a minimum retrenchment package is provided by section 41(1) of the South African Basic Conditions of the Employment Act, 1997¹¹⁴ which provides as follows:

An employer must pay an employee who is dismissed for reasons based on the employer's operational requirements severance pay equal to at least one week's remuneration for each completed year of continuous service with that employer.

Although the legislation does not provide for a minimum retrenchment package, it is submitted that it makes it mandatory for a retrenchment package to be paid. This is evident from section 12C(2), which provides that the employer and the employees concerned must seek to agree on (i) whether or not the employees should be retrenched, and if so (ii) the terms and conditions on which they may be retrenched. The legislation further provides that where retrenchment is unavoidable, the ‘consequences of retrenchment to employees should be mitigated so far as

112 See section 7 of the Regulations.

113 Ibid. at p. 411G.

114 Act No. 75 of 1997.

possible'.¹¹⁵ If there is no agreement on benefits to be paid, the matter is referred to the Retrenchment Board, and thereafter to the Minister, who is required to 'approve the proposed retrenchment subject to such terms and conditions as he may consider necessary or desirable to impose'.¹¹⁶

That the Legislature regards the payment of a retrenchment package as mandatory is put beyond debate by section 13 of the Labour Act, which provides for the payment of wages and benefits upon termination of employment. An employee whose employment has been terminated for any reason is entitled to the wages and benefits due to him or her up to the time of termination. This must be paid as soon as reasonably practicable after the termination. An employer who fails to do so commits an unfair labour practice. It is in this context that section 13(1a) provides as follows:

Wages and benefits payable to any person or to his or her estate in terms of this section shall not form part of or be construed as a retrenchment package which an employee is entitled to where his or her employment has been terminated as a result of retrenchment in terms of section 12C.

Clearly, the basis for this provision is that a retrenchment package is mandatory in all cases where employment is terminated as a result of retrenchment.

In view of the fact that a proper reading of the Act requires an agreement to be reached on a retrenchment package, the Minister cannot approve a retrenchment without prescribing a retrenchment package. This follows logically from the fact that he or she only enters the retrenchment scene when the parties have failed to reach an agreement on, *inter alia*, retrenchment packages, and his or her role is to impose a reasonable package.

An employer who wishes to retrench is therefore obliged to pay a retrenchment package, the only issue being the quantum of that package. The Supreme Court, in *Continental Fashions (Pvt) Ltd v Mupfuriri & Ors*¹¹⁷ purported to set out some guidelines. In that case, a company which was in serious financial difficulty sought to retrench some of its employees to avoid liquidation. McNally JA held that the ability of the

¹¹⁵ Section 12C(11)(a)(ii).

¹¹⁶ Section 6(1) of the Regulations.

¹¹⁷ 1997 (2) ZLR 405 (S).

company to pay the retrenchment package was the ultimate criterion in determining the quantum of the package:

*Clearly therefore, although it is not stated in the Regulations, the ability of the company to pay the retrenchment package is the ultimate criterion – the bottom line. If the company cannot pay what it is ordered to pay it must go into liquidation, which is what the retrenchment exercise was designed to avoid.*¹¹⁸

This approach is misconceived. There can be no such thing as ‘the ultimate criterion’ in the assessment of a retrenchment package, if one takes into account the rationale of retrenchment law. The main rationale of retrenchment law is, or should be, to strike an appropriate balance between the competing interests of the employer and those of the employees to be retrenched. The ability of the employer to pay a proposed package is merely one of the factors to be taken into account in the assessment of the quantum of a retrenchment package. The other important factor is the mitigation of the adverse consequences falling on the employees to be retrenched. It is submitted that the other factors to be taken into account should include the prevailing practices in the industry concerned. A court or authority being called upon to make an assessment of a retrenchment package must impose a reasonable package, having ultimate regard to the factors mentioned above. The ultimate test is one of reasonableness.¹¹⁹ It has also been said that the retrenchment package should simply not be ‘unduly oppressive or discriminatory’.¹²⁰ The result of this approach is that even where retrenchment has been resorted to for purposes of avoiding liquidation, inability to pay cannot be a defence against an order to pay a ‘reasonable’ package.

The employer may have to borrow to pay a retrenchment package, as long as that package is adjudged to be reasonable.

When is a package ‘reasonable? The answer is that this is a matter of discretion for the court or authority making the assessment. In terms of general principles of law, an assessment would be regarded as unreasonable and therefore liable to be set aside on review, if it is such that no reasonable person, applying his or her mind to the facts, would have

118 At pp. 407H-408A.

119 See *Chinyerere & Ors v COTCO* SC 113/1999.

120 Ibid.

arrived at it.¹²¹ McNally JA put it as follows in *Mashave & Ors v ZUPCO & Anor*:¹²²

*It is not the function of this court to decide what the appropriate level of compensation is. The machinery for so deciding has been established, and so long as it functions correctly, and comes to a conclusion which is not wildly unreasonable, the courts cannot interfere.*¹²³

There is, therefore, no basis for the suggestion by the Supreme Court in the *Continental Fashions* case (*supra*) that different criteria apply in the assessment of retrenchment packages depending on whether the retrenchment results due to the mechanization of operations or from loss of profitability. The nature of the retrenchment may only affect the relevant weight to be placed on the key factors of (i) the ability of the employer to pay, and (ii) the mitigation of the adverse consequences falling on employees to be retrenched. For instance, where the retrenchment emanates from mechanization, the ability of the employer to pay may be less important than the need to cushion the employees concerned from the adverse consequences of retrenchment. This may translate into a high retrenchment package. On the other hand, where the retrenchment emanates from loss of profitability, the inability of the employer to pay may be more significant than the other factor and this may translate into a low retrenchment package. Each case depends on its own facts. However, it appears that of the two key factors, the mitigation of the adverse consequences of retrenchment is the more important factor. This is fortified by section 12C(11) which requires an authority, the Retrenchment Board and the Minister, as the case may be, to pay ‘due regard’ to the consideration that ‘the consequences of the retrenchment to employees should be mitigated so far as possible’. This requires that the factor of ‘inability of the employer to pay’ should play second fiddle to the need to ensure a reasonable package for the employees to be retrenched.

It is difficult to tell from the legislative provisions what are the main objectives of the retrenchment package. It has been said of severance allowances in general:

There has been much discussion about the nature of sever-

121 Ibid.

122 2000(1) ZLR 478(S).

123 At p. 483F.

*ance allowances. Are they an element of wages, payment of which has been postponed? Or are they the worker's 'share' in the undertaking, increasing with his length of service? Or a valuation of his job property rights? Or simply a means of income protection during a period of unemployment, helping him to adjust and move to new employment.*¹²⁴

The options mentioned in the passage are not mutually exclusive. In the case of Zimbabwe, the legislation, in seeking to minimize the consequences of retrenchment, can be said to accommodate both income protection for the retrenched employee while at some time realizing his or her value in the undertaking.

May an employer decide not to proceed with an agreed or approved retrenchment?

Three different scenarios mark the completion of a retrenchment process in terms of legislation:

- (a) approval by the works council of an agreement between the employer and the employees concerned in terms of section 12C(3);
- (b) approval by the Minister of the proposed retrenchment in terms of section 12C(9)(a);
- (c) an agreement signed by the employer and all the employees concerned and sent to the Retrenchment Board in terms of section 3(7) of SI 186/2003 in retrenchments of less than five employees.

Is an employer in any of these three scenarios entitled to resile from the approved or agreed retrenchment? In principle, yes, because the employer's notice which triggers the retrenchment procedures is of an 'intention' to retrench. The terms and conditions of the retrenchment may defeat the original reasons for an intention to retrench. In principle, the effect of an approval in (a) and (b) and of the agreement in (c) is:

If you still intend to retrench, you may proceed but only in accordance with the following terms and conditions...

This is what the Supreme Court has pronounced as the law in *Freda*

124 See Hepple (1998), p. 277.

*Rebecca Gold Mine Holdings Ltd v M Nhliziyo & Ors.*¹²⁵ An approval of the retrenchment is not an automatic termination of employment. After any of the above scenarios, the employer must decide whether or not to terminate employment pursuant to the approved or agreed retrenchment.¹²⁶ So there are two separate juristic acts: (i) approval of, or agreement on, the retrenchment, and (ii) termination of employment by the employer pursuant to the approved or agreed retrenchment. If the employer decides not to terminate employment, the employees remain employed notwithstanding the approved retrenchment. On the other hand, if the employer decides to terminate employment, it must proceed with the retrenchment as approved or agreed and in particular, pay the approved or agreed retrenchment packages. Ziyambi JA in the *Freda Rebecca* case (*supra*) summarizes the position as follows:

*A contract of employment is concluded by an employer and an employee and can only be terminated by one or other of them. The Minister not being a party to the employment agreement could not terminate it... Thus, in approving a proposed retrenchment, the Minister is in effect saying 'You may proceed with the retrenchment but only on these conditions'. The Minister's directive is not constitutive of the retrenchment nor does it terminate the contracts of employment of the proposed retrenchees. It merely sets the conditions upon which the employer, if still so minded, can proceed to retrench. The contract is terminated by the employer when it proceeds with the retrenchment.*¹²⁷

Measures to Prevent, or Minimize Effects of Retrenchment

An important aspect of retrenchment law in Zimbabwe is the emphasis given to either preventing retrenchment altogether or minimizing its effects. First, before giving notice of the intention to retrench any employees, an employer may agree with the employees concerned to avoid retrenchment by placing employees on short-time work or instituting a system of shifts. If the parties agree, retrenchment is avoided.¹²⁸ Secondly, an authority to which a retrenchment notice has been served is

125 SC 16/2013.

126 Ibid.

127 At pp. 3-4.

128 Section 12D(2).

required to attempt to secure agreement between the parties on whether or not to proceed with retrenchment.¹²⁹ In principle, the parties may agree not to proceed with retrenchment, in which case the employer will abandon its intention to retrench. Thirdly, the Minister has the power to refuse to approve a proposed retrenchment if he or she is satisfied that it is avoidable.¹³⁰ It is important to note that any agreement entered into for the purposes of implementing measures to avoid retrenchment overrides any collective bargaining agreement to the contrary.¹³¹ Fourthly, every employer is obliged to inform its employees of any major changes that are likely to entail the retrenchment of any of its employees. This is stated in section 12D(1) in the following words:

Every employer shall ensure that, at the earliest possible opportunity, his employees are kept informed of, and consulted in regard to, any major changes in production, programmes, organizations or technology that are likely to entail the retrenchment of any group of five or more employees in a six-months period.

This duty on the employer is designed to keep employees in the picture about the state of the employer so that retrenchment does not come as a surprise. In that way, it is a provision aimed at lessening the effects of retrenchment by making employees generally prepared for this eventuality, should it occur. However, its effectiveness is a matter of doubt. The legislation does not provide remedies for breach of this duty nor does it make clear the scope of consultation envisaged. What is consultation? Although the regulations do not say what it entails, it is suggested that it must be *bona fide*, must seek to achieve consensus between the employer and the employees and must afford the employees a fair and reasonable opportunity to express their views and proffer suggestions.¹³² While it is clear that consultation does not require the reaching of an agreement, it would appear that it entails the provision of relevant information by the employer.¹³³ The employer may be held to have complied with the duty

129 See Section 12C(2).

130 Section 12C(9)(b).

131 Section 8B(2).

132 See *Hadebe & Ors v Romatex Industries Ltd* (1986) 7 ILJ 726 (LC); *Atlantis Diesel Engines (Pty) Ltd v National Union of Mine Workers of SA* (1994) 15 ILJ 1247 (A).

133 See *NUMSA & Ors v Comark Holdings Ltd* (1997) 5 BLLR 589 (LC).

to consult if actual consultations fail because of unreasonable preconditions set by the employees.¹³⁴

It is submitted that where this duty has been breached, employees may use that fact as a basis for resisting a proposed retrenchment, the argument being that the employer has not given the employees sufficient warning of the pending retrenchment. In other words, the employees may use that fact to refuse to agree, in which case the dispute will have to reach the Minister, who should use the same fact to decline to approve the proposed retrenchment.

In the name of labour market flexibility, some measures in the old law were removed in 2002. In the old law, in cases where retrenchment was unavoidable, the workers were entitled to insist on the phasing of retrenchments over a period, and on equitable criteria for selecting employees to be retrenched.¹³⁵ The Supreme Court had even said that the criteria used to choose employees for retrenchment had to be fair and reasonable.¹³⁶ It had indicated, *obiter*, that the principle of 'last in, first out' (LIFO) was a suitable starting point.¹³⁷ This was not stated in the old regulations, and therefore, in principle, parties were entitled to agree to any criterion which, in the circumstances of the situation, was fair and reasonable. However, the LIFO principle is generally accepted in other countries as fair and reasonable.¹³⁸

There is potential room for abuse in any system which permits an employer to resort to measures of the sort mentioned above to avoid retrenchment. For instance, an employer may resort to the measures as a cost-cutting gimmick while pretending that it is seeking to avoid retrenchment. Retrenchment legislation seeks to minimize this abuse in two ways – the employees concerned must agree to the measures and the measures can only be implemented for a maximum of twelve months.¹³⁹

134 See *NEHAWU v University of Fort Hare* (1997) 8 BLLR 1054 (LC) where the South African Labour Court refused to interdict a retrenchment when the union declined consultation on the basis that it wanted the issue of the chairing of the consultation meetings to be resolved before the process could begin.

135 Section 3(2a)(b) of the old regulations, SI 404/1990.

136 *Chidziva & Ors v ZISCO* 1997 (2) ZLR 368 (S).

137 *Ibid.*

138 See Grogan, 1998, p.169.

139 Section 12D(2).

TERMINATION OF EMPLOYMENT

5. REMEDIES FOR UNLAWFUL TERMINATION

Introduction

There are three main remedies for an unlawful termination: reinstatement, re-employment and damages.

Reinstatement

Reinstatement under the common law

Under the influence of the English common law, the old approach by South African courts to reinstatement as a remedy in cases of unlawful dismissal was uncompromising: reinstatement was taken as an order for specific performance, which was said to be unavailable in employment contracts.¹ The employee was only entitled to an order for damages, notwithstanding the unlawfulness of his dismissal. The admitted exception to this rule was with public service employees, whose position was said to be governed by statute, and any dismissal contrary to the statute was always treated as a nullity.² English authorities which backed this

1 *Schierhout v Minister of Justice* 1926 AD 99; *Grundling v Beyers* 1967 (2) SA 131 (W); *Stoop v Lichtenburg Town Council* 1952 (2) SA 72 (T); *Kubheka v Imextra (Pty) Ltd* 1975 (4) SA 484 (W).

2 See in particular *Schierhout v Minister of Justice*, *supra*.

approach are numerous.³ In essence, this approach by the courts meant that employment contracts were in a class of their own, since specific performance was, in principle, available as a remedy in other cases of breach of contract.⁴

However, South African courts departed from this rigid approach to reinstatement. First was the case of *Stewart Wrightson (Pty) Ltd v Thorpe*,⁵ which demolished the notion that employment contracts were different from other contracts so far as specific performance was concerned. The court emphasized that, just as in other contracts, specific performance was in principle available for breach of an employment contract. The matter was then put beyond doubt in *National Union of Textile Workers' v Stag Packagings (Pty) Ltd & Anor*,⁶ where it was made clear that there was no rule against specific performance, at least in employment contracts, although in many cases specific performance will be denied owing to the nature of the contract. This was followed in subsequent cases.⁷ Thus under this approach, reinstatement is only available at the discretion of the court.

Zimbabwean courts have adopted this new South African approach, which makes specific performance available, in principle, for breach of an employment contract but subject to the discretion of the court.⁸ It should be remarked, however, that even English courts have not remained rigid and have allowed, to some extent, exceptions to the general rule against reinstatement under the common law.⁹

Two main reasons have always been given for both the outright denial of reinstatement and the discretionary granting of reinstatement. These were summarised by Innes CJ as follows:

The inadvisability of compelling one person to employ

3 See for example *Ryan v Mutual Tontime Westminster Chambers Association* (1893) 1 CH 116; *De Francesco v Barrum* (1890) 45 ChD 430; *Chappel v Times Newspapers* [1975] 1 WLR 482.

4 *Farmers Co-operative Society v Berry* 1912 AD 343.

5 1977 (2) SA 943 (A).

6 1982 (4) SA 151 (T).

7 See *Myburgh v Danielskuil Munisipaliteit* 1985 (3) SA 335 (HC); *Tshabalala & Ors v Minister of Health & Welfare* (1986) 7ILJ 168 (W).

8 See *Zvoma v Amalgamated Motor Corporation (Pvt) Ltd* 1988 (1) ZLR 60 (HC); *Commercial Careers College (1980) Pvt Ltd v Jarvis* 1989 (1) ZLR 344 (SC); *Art Corporation Ltd v Moyana* 1989 (1) ZLR 304 (SC).

9 See *C H Giles & Co. Ltd v Morris* [1972] WLR 307.

*another whom he does not trust in a position which imports a close relationship; and the absence of mutuality, for no court could, by its order, compel a servant to perform his work faithfully and diligently.*¹⁰

It has also been said that damages are an adequate remedy anyway and, in addition, specific performance may potentially involve the oppression of the employee in being forced to work at the insistence of the employer.¹¹

Be that as it may, whether one takes the outright denial of reinstatement approach or the new one in which the courts have a discretion to order reinstatement, the fact is that under the common law the remedy of reinstatement is largely unavailable. With the later approach, the discretion of the courts is usually exercised to deny reinstatement either on the ground of mutual incompatibility, or disappearance of the trust that should exist between the two parties.

The current common law position on reinstatement in both Zimbabwe and South Africa is as follows: it is not a rule of law that reinstatement is not available in employment contracts. The courts have discretion, and in the exercise of the discretion reinstatement will not normally be granted.¹² There are appropriate cases where the courts exercise their discretion in favour of granting reinstatement.¹³

Of what relevance is this common law position today? It is relevant in that not every employment relationship is regulated by legislation. Most employment relationships not governed by the Labour Act are subject to the common law position on reinstatement.

In *Commercial Careers College (1980) (Pvt) Ltd v Jarvis*¹⁴ the court ordered reinstatement after considering, among other factors, that the employee, who was a tutor at an educational institution, did not need to enjoy cordial relations with the managing director as her services involved the teaching of students without any frequent personal contacts

10 In *Schierhout v Minister of Justice (supra)* at p.107.

11 See *Chappell v Times Newspaper Ltd* [1975] 1 WLR 482.

12 See *Seloadi v Sun International* 1993 (2) SA 174 at 1861-190E; *Masetlha v President of the Republic of South Africa and Another* 2008 (1) SA 566 (CC).

13 *Commercial Careers College (1980) (Pvt) Ltd v Jarvis (supra)*; *Airlines (Pty) Ltd v Roediger* 2008 (1) SA 293 (W); *Santos Professional Football Club (Pty) Ltd v Igesund & Anor*, 2003 (5) SA 73 (C) at 78-81.

14 *Ibid.*

between her and the managing director.

Reinstatement under the Labour Act

Development of statutory reinstatement: 1985-2003

In 1985, the Labour Relations Act provided for statutory reinstatement in the following terms:

- (1) After due inquiry into, and consideration of any matter that has been referred to it... a determining authority may –
 - (a) make such order as it thinks appropriate for determining the dispute or rectifying the unfair labour practice concerned;
- (2) Without derogation from the generality of subsection (1), an order made in terms of that subsection may provide for or direct, as the case may be –
 - (a) back pay from the time of the dispute or unfair labour practice concerned;
 - (b)
 - (c) reinstatement in a job; as may be appropriate.

Clearly, reinstatement was one of the competent remedies that could be granted for unlawful termination of employment. The Act did not provide a hierarchy of remedies and, in fact, reinstatement was accorded an equal ranking with the other remedies. The common law approach of making reinstatement rare, and an exception rather than the rule, was overridden. On the contrary, given the dominant intention of the Act to improve the position of the worker by, *inter alia*, protecting employment and by adopting a purposive approach to interpretation, it was arguable that the Act reversed the common law approach and made reinstatement the favourable remedy. Such an interpretation of the Act was quickly shot down by the Supreme Court. In *Art Corporation Ltd v Moyana*,¹⁵ McNally JA emphatically rejected any attempt to make reinstatement the favourable remedy. He did so without even examining the scheme of the Labour Relations Act. He had this to say:

The Tribunal appears to have taken the view that if the dismissal was unlawful Mr Moyana was ipso facto entitled to

15 *Supra*.

reinstatement. They found his dismissal was unlawful and therefore they ordered his reinstatement.

It seems to me, with respect, that in this the Tribunal was wrong. Reinstatement is not the only or the inevitable remedy for wrongful dismissal.¹⁶

The approach of making the Labour Relations Act provide for no more than the common law was endorsed by Gubbay JA (as he was then was) in *Commercial Careers College (1980) (Pvt) Ltd v Jarvis*,¹⁷ where he avoided a very persuasive approach to the contrary. In the High Court, Sandura JP had taken the view that any termination of employment contrary to the Labour Relations Act was a nullity and accordingly, the employee was entitled, as of right, to reinstatement. While Gubbay JA admitted the forcefulness of this approach, he refused to follow it and maintained that reinstatement depended on the discretion of the court. In his words:

I propose to adopt the approach that even where the unlawful dismissal relates to an employee whose tenure of employment is protected by legislation, the court retains a discretion to consider whether it is appropriate to order reinstatement.¹⁸

This approach effectively retained the common law position which makes the remedy of reinstatement almost unavailable. While the Act certainly gave discretion to a ‘determining authority’ to order reinstatement, it contemplated a remedy superior to the conception of the common law. There is little point in enacting legislation that rigorously restricts termination of employment if that legislation can be flouted without the employer suffering an order of reinstatement.

In 1992, section 111 of the Labour Relations Act was amended. The amendment went even further than the common law in denying the remedy of reinstatement. The amendment provided that where reinstatement was ordered, the order also had to ‘specify an amount of damages to be awarded to the employee concerned as an alternative to his reinstatement’. Section 111 became section 96 and read as follows:

Without derogation from the generality of sections

¹⁶ At p. 131 D-E.

¹⁷ *Supra*.

¹⁸ At p. 349E.

ninety-three and ninety-five, a determination made in terms of those sections may provide for –

- (a) back pay from the time when the dispute or unfair labour practice arose;
- (b) ...
- (c) reinstatement or employment in a job provided that any such determination shall specify an amount of damages to be awarded to the employee concerned as an alternative to his reinstatement or employment.

This amendment effectively sealed the fate of reinstatement as an order under Part XIII of the Labour Relations Act. Every order of reinstatement had to give the employer the option of paying damages instead. There could be no question of an employer being obliged to reinstate under Part XIII of the Labour Relations Act.

What of orders outside Part XIII of the Act? Part XIII of the Act was not the only part dealing with termination of employment. Issues relating to termination of employment under the old SI 371/1985 and, in particular, situations where an employee was summarily suspended without pay pending permission to dismiss from a labour relations officer, fell outside it. Before 1996, there was great scope for reinstatement under SI 371/1985 owing to the approach which the Supreme Court had enunciated, albeit *obiter*, in *Masiyiwa v TM Supermarket*.¹⁹ In that case, the Supreme Court held, *obiter*, that a labour relations officer faced with an application to dismiss under section 3 of SI 371/1985 had only two choices: dismiss or reinstate. He had no discretion. If he found that the misconduct allegations had not been proved, he had to reinstate. He could not, for instance, order the payment of damages by the employer where he found the allegations not to have been proved but felt that reinstatement was inappropriate. This was followed in a number of cases.²⁰ The Supreme Court then put this approach on a firm footing in *United Bottlers (Pvt) Ltd v Murwisi*.²¹ However, barely a year after that judg-

19 1990 (1) ZLR 166 (S).

20 See *Kadoma Magnesite (Pvt) Ltd v Acting Regional Hearing Officer* 1991 (1) ZLR 283 (H); *Wholesale Centre (Pvt) Ltd v Mehlo & Ors* 1992 (1) ZLR 376 (H); *Zimbabwe Mining & Smelting v Mafuku* SC 246/1992; *Caltex Oil (Zimbabwe) (Pvt) Ltd v Mutsvangwa* SC 95/1993.

21 1995(1) ZLR 246 (S).

ment, the Supreme Court changed its approach.

In *Hama v National Railways of Zimbabwe*,²² the Supreme Court held that in an application under section 3 of SI 371/1985, a labour relations officer was not limited to the two choices of either dismissing or reinstating, but had the further choice of ordering the payment of damages in place of reinstatement. The reasoning which led to this further restriction on the remedy of reinstatement demonstrated, beyond doubt, the Supreme Court's failure to appreciate the essence of the Labour Relations Act: it reasoned that there was nothing in the Act to show that the Legislature intended to depart from the common law principle of 'reinstatement or damages'. This reasoning was not in line with the thrust of SI 371/1985 on two grounds. First, SI 371/1985 dealt with a specific issue of 'summary suspension' without pay for alleged misconduct. The employer was required to prove the alleged misconduct before permission to dismiss was granted. It should have followed that where the employer failed to prove the misconduct, the basis of the suspension fell away and the employee had to return to work. It was not even accurate to speak of 'reinstatement' where an employee had been suspended because there was no dismissal. The Legislature could surely not have intended to remedy an unlawful suspension by the principle of 'reinstatement or damages'. Secondly, there was no provision for the making of orders relating to the payment of damages under SI 371/1985. The Legislature conceived this legislation in order to control unlawful termination of employment. It obliged an employer to seek the approval of the Ministry of Labour before terminating employment. One either got permission to terminate or did not get such permission. There was no scope for the payment of damages.

Be that as it may, the effect of *Nicholas Hama v National Railways of Zimbabwe* was that even under the then SI 371/1985, reinstatement was also now almost unavailable as the common law approach had taken over. The courts were to use their discretion in line with common law principles to refuse reinstatement,²³ almost invariably.

The significance of tracing this historical development of statutory reinstatement is to show that even before the Legislature moved in to impose the option of damages whenever reinstatement was ordered, the courts had already placed the remedy of reinstatement in the domain of

22 1996 (1) ZLR 664 (S).

23 See, for example, *Winterton, Holmes & Hill v Paterson* 1995 (2) ZLR 68 (S).

their exclusive discretion. In other words, notwithstanding the language of the Labour Act, reinstatement was only available if the court considered it a reasonably practicable remedy. This history shapes our understanding of the scope of the remedy of reinstatement in the present law.

Statutory reinstatement: present law

Whenever the remedy of reinstatement is sought from a cause of action arising under the Labour Act, it cannot be granted alone: there must always be an alternative of damages. This arises from section 89(2)(c) (iii).

Despite the reference in the section to ‘in an application...’, there can be no order of reinstatement under the Labour Act which is not accompanied by the option for the payment of damages. In other words, arbitrators and the Labour Court have no power to order reinstatement alone, no matter how appropriate the remedy may be. This arises from basic statutory interpretation: the scope of the power of the Labour Court in section 89(2), which it may exercise in an application under section 93(7), is the same power it may exercise in the case of an appeal under section 89(2)(a). This is also the same power given to arbitrators by section 98(9).

The recommended formulation of an order involving reinstatement is the following:

The claimant/appellant is to be reinstated into his or her former position as (name of job/post) with no loss of salary or other benefits with effect from (date) and in the event that such reinstatement is no longer possible, the claimant/appellant is to be paid such damages as an alternative to reinstatement as may be agreed upon between the parties or that failing, as may be determined upon application by this court/tribunal.²⁴

Some may misconstrue the *obiter* remarks of McNally JA in *ZUPCO v Chisvo*²⁵ as support for the view that there may be appropriate cases where reinstatement alone may be granted as a remedy under the Labour Act. The *ZUPCO* case is authority for the contrary. It accepts that there can be no order of reinstatement under the Labour Act without the option of damages. In fact, the order of the Tribunal in that case, which was not

²⁴ See this formulation in *Zimnat Life Assurance Ltd v George Dikinya* SC 30/2010 at p. 18.

²⁵ 1999 (1) ZLR 67 (S).

disturbed on appeal, provided for reinstatement or damages. Its *obiter* remarks were a mere critique of the provision in question. This is what McNally JA said:

We are aware that the alternative of damages is an essential part of any order of reinstatement, in terms of the clear provisions of s96 (1)(c) of the Act (Chap 28:01). But there must be cases, and this would appear to us to be one of them, where reinstatement is the obviously equitable solution, unless of course the employee does not want to be reinstated or has for health or other reasons become incapable of reinstatement. There is no question of there being any difficulty or awkwardness in the relationship between employer and employee if he is reinstated. And one may also venture to say that no amount of damages can make up for a long-term job unjustifiably lost... However, it would appear to this court that the quantum of damages in a case like the present should be sufficiently high to suggest to the employer that reinstatement is the more appropriate and equitable alternative.²⁶

The last sentence contains a suggestion on mitigating the unavoidable position that reinstatement cannot be granted as the only remedy.

An employee who approaches a court seeking reinstatement only, and without also claiming the alternative order for the payment of damages in lieu of reinstatement, risks having the application dismissed on the basis that the relief sought is misconceived.²⁷

The contrary view that reinstatement alone may be ordered by the Labour Court under section 89(2)(a) found favour with Garwe JA, albeit *obiter*, in *Zimnat Life Assurance Ltd v George Dikinya*.²⁸ He was of the view that section 89(2)(c) only applies to applications made in terms of section 93(7)(ii), and that under section 89(2)(a) the Labour Court had a wide discretion in appeals, including substituting its own discretion or order. However, despite expressing those views, Garwe JA ordered ‘reinstatement or alternatively damages’. With respect, the views are a wrong reading of section 89(2).

In section 89(2)(a), the Labour Court is a court of appeal, while in

²⁶ At pp. 68E-69A.

²⁷ *Olivine Industries (Pvt) Ltd v Gwekwerere* 2005 (2) ZLR 421 (S).

²⁸ SC 30/2010.

section 89(2)(c) it is a court of first instance. As a court of appeal in section 89(2)(a), its wide discretion is limited to the options available to the court *a quo*. In other words, it has a discretion to substitute its own order in place of the order of an arbitrator, but it must pick its substitute from those orders that were available to the arbitrator. Now, what orders are available to the arbitrator? The orders available to the arbitrator, by virtue of section 98(9), are the orders in section 89(2)(c). The clear intention of the Legislature in giving arbitrators the 'same powers' as the Labour Court in section 98(9) is to give the arbitrators those powers of the Labour Court where the latter is acting as a court of first instance in applications under section 93(7). This is also a matter of common sense, because an application under section 93(7) is made after a failure to refer the dispute to an arbitrator. In an application under section 93(7), the Labour Court, in essence, is sitting as an arbitrator. It is sitting over a matter that should have been referred to an arbitrator but for some reason was not so referred.

If section 89(2)(a) is the only basis upon which reinstatement may be ordered as the only remedy, that means it can only be ordered on appeal. How many matters go on appeal to the Labour Court? Why should a distinction be drawn between employees who do not appeal and those who choose to appeal? These questions show the glaring absurdity arising out of an interpretation that arrogates to the Labour Court the discretion to order reinstatement only under section 89(2)(a). There can be no jurisprudential justification for according an employee who reaches the Labour Court via section 93(7) less rights than one who lands in the same court as an appellant.

A number of legal aspects arise from the remedy of reinstatement under the Labour Act. The following are the most important.

What is reinstatement?

The Act does not define reinstatement. In *Chegutu Municipality v Man-yora*²⁹ McNally JA defined reinstatement as follows:

In other words, to reinstate a person means in effect to put a person again into his or her former job. That can only be done in the present or the future. Not in the past. The past is covered, where necessary, by an order for back pay and compensation... I conclude, therefore, that 'reinstatement' in

29 1996 (1) ZLR 262 (S).

the employment context means no more than putting a person again into his previous job. You cannot put him back into his job yesterday or last year. You can only do it with immediate effect or from some future date. You can, however, remedy the effect of previous injustice by awarding back pay and/or compensation. But mere reinstatement does not necessarily imply that back pay and/or compensation automatically follows.

This is plainly wrong. Reinstatement, as a statutory remedy, cannot be less than specific performance under general principles of the law of contract. In principle, the reinstated employee must be treated as if he/she had not been dismissed. Although there is no definition in the Labour Act, the Legislature must be taken to have intended a meaning which treats the reinstated employee as if he/she had not been dismissed. The better position is to say that reinstatement may be retrospective.³⁰ Where it is retrospective, its effect is to restore the *status quo ante* the dismissal or suspension. This means putting the employee back in the position as though the alleged misconduct and other proceedings had not happened.³¹

In South Africa, although reinstatement is not defined in the legislation, eminent authors have said:

*A reinstatement order restores the contractual position between the employer and the employee as if it was never broken, meaning the employee is also entitled to be paid for the retrospective period of reinstatement and entitled to benefits that may have accrued during the retrospective period of reinstatement. Consequently rights, such as seniority rights, will be unaffected.*³²

In England, reinstatement is defined as:

*an order, that the employer shall treat the complainant in all respects as if he had not been dismissed.*³³

Be that as it may, the position in *Chegut Municipality v Manyora*³⁴ is the law in Zimbabwe and reinstatement is not necessarily retrospective.

30 *Standard Chartered Bank of Zimbabwe Ltd v Matsika* 1997 (2) ZLR 389 (S).

31 *Ibid.*, p. 392B-C.

32 Basson (2009), p. 378

33 Section 79(2), Employment Protection (Consolidation) Act, 1978.

34 *Ibid.*

To be retrospective, the order must specifically say so.

Is reinstatement automatic?

The fact that an order of reinstatement must always give the employer the option of paying damages does not mean that reinstatement is automatic in every case of an unlawful termination of employment. It is still a discretionary remedy and must not be ordered where it is inappropriate or inequitable to do so.³⁵ In other words, where reinstatement is not appropriate, it is permissible to order the payment of damages as the only remedy. This is so notwithstanding the *obiter* remarks of Gubbay CJ in *Gauntlet Security Services (Pvt) Ltd v Leonard*.³⁶ In that case, the employee, a security guard, was injured in the course of employment. He sustained a badly twisted left hip. After a brief absence on sick leave, he returned to work. On the day he returned to work, he complained that he was feeling unwell but the employer ordered him to remain on duty. He refused. He was eventually dismissed for 'wilful disobedience to a lawful order'. The Labour Relations Tribunal accepted his appeal and reversed his dismissal on the ground that his refusal to work had not been wilful. It arose from incapacity due to injury. The Tribunal considered reinstatement inappropriate on the basis that his injury made him unfit for the duties he previously performed. The Tribunal ordered damages only. On appeal, Gubbay CJ made the following remarks, *obiter*:

Yet even though reinstatement did not appear to be a viable option, I think the proper order to make was 'reinstatement or employment in a job, or the payment of \$x as damages' – thereby affording the appellant the choice.

There is no basis for this approach. If reinstatement is not appropriate, it must not be ordered. Put differently, is reinstatement the primary remedy? There is no scheme of a primary remedy in the Labour Act. The insistence on 'reinstatement or damages' means that the two remedies have an equal standing. It is the employer who decides which of the two remedies to apply. An example of reinstatement as a primary remedy is section 193(2) of the South African Labour Relations Act, 1995 which says:

(2) The Labour Court or the arbitration must require the

³⁵ See section 89(2)(c)(iii)(ii).

³⁶ 1997 (1) ZLR 583 (S).

employer to reinstate or reemploy the employee unless –

- (a) the employee does not wish to be reinstated or re-employed; or
- (b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable, or
- (c) it is not reasonably practicable for the employer to reinstate or re-employ the employee; or
- (d) the dismissal is unfair only because the employer did not follow a fair procedure.

In terms of this provision reinstatement is the primary remedy, because it must be ordered if a dismissal is found to be unfair unless one of the four circumstances (a-d) applies. In our case, if reinstatement is ordered, the employer must always be given an option to pay damages as an alternative.

If reinstatement is inappropriate, the court or arbitrator must consider the other two remedies: damages or employment.

The onus is on the employer to prove, on a balance of probabilities, that reinstatement is no longer appropriate.³⁷ Obviously, where an employee dismissed before retirement age has reached retirement age by the time of the judgment by the court, reinstatement cannot be ordered.³⁸ The most widely accepted ground for refusing reinstatement is where the employer-employee relationship has broken down to such an extent that trust between the parties has been lost. The Supreme Court has stated the principles involved in cases such as *Commercial Careers College (1980) (Pvt) Ltd v Jarvis*,³⁹ *Winterton, Holmes & Hill v Paterson*⁴⁰ and *Girjac Services (Pvt) Ltd v Mudzingwa*.⁴¹ In the *Commercial Careers College*, the court said:

It is easy to conceive of a situation in which albeit no blame whatsoever attaches to the employee, the inescapable inference is that the personal relationship between him and the employer had broken down to the extent that trust in one

37 Ibid.

38 *Munhumutema v Tapambwa & Ors* 2010 (1) ZLR 509 (H).

39 1989 (1) ZLR 344 (S).

40 1995 (2) ZLR 68 (S).

41 1999 (1) ZLR 243 (S).

*another has been lost. For a court to order reinstatement against such a backdrop of animosity and ill-will, solely because an employee unreasonably and out of wounded pride seeks it, would be to permit the continuation of an intolerable personal relationship – one which would make it impossible for the employee to perform his duties either to his own satisfaction or to that of his employer.*⁴²

In the *Girjac Services* case (*supra*), it added:

*The respondent (employee) was a fairly senior employee. He was a person in whom the appellant (employer) reposed trust. He had a position which imparted a close association with its manager. It cannot be doubted that from the appellant's viewpoint the personal relationship between it and the respondent had broken down to the extent that confidence in the respondent's honesty had been lost, there was no prospect of restoring a normal employer-employee relationship. Therefore, to have ordered the respondent's reinstatement – to have thrust him back upon the appellant, a relatively small organization, against its will – was to create for it an intolerable situation.*⁴³

The onus of proving the breakdown of the relationship to the extent expressed in these sentiments is on the employer who must produce evidence. A mere bald assertion is not sufficient.⁴⁴

The employer must produce evidence of the breakdown of the relationship. It is not enough merely to allege that the relationship has broken down.⁴⁵ It is irrelevant that the employee is not to blame for the breakdown of the relationship: if the relationship has broken down to the extent that trust is lost, reinstatement is inappropriate even where no blame whatsoever attached to the employee.⁴⁶

Another ground where reinstatement is refused is where the employee had taken up employment with another employer.⁴⁷ Where a dismissed

42 At p. 349F.

43 At p. 250A-B.

44 *Dairibord Zimbabwe Ltd v Muyambi* 2002 (1) ZLR 448 (S).

45 *Dairibord Zimbabwe Ltd v Muyambi* 2002 (1) ZLR 448 (S).

46 *Commercial Careers College (1980) (Pvt) Ltd v Jarvis* 1989 (1) ZLR 344 (S).

47 *Maguchu v Lever Bros (Pvt) Ltd* 2000 (2) ZLR 187 (S).

employee has taken up a new job, reinstatement is wholly inappropriate.⁴⁸ This is not because the taking up of a new job is a repudiation, as characterized by the Supreme Court in *Maguchu v Lever Bros*, but on the basis of it being an improper exercise of discretion to order reinstatement in the circumstances.

In *Muringi v Air Zimbabwe Corp & Anor*⁴⁹ reinstatement was refused where it was proven that the Government and the Air Zimbabwe Board had lost confidence and trust in the general manager (the applicant).

Where an employer seeks to frustrate reinstatement by engaging a permanent replacement for the dismissed employee before the finalization of the case, this factor must be regarded as irrelevant, otherwise the employer would profit from its own wrong. Employers are expected, where reasonable, to arrange for the dismissed employee's work to be done by, at most, a temporary replacement.

Does reinstatement entail an obligation on the employer to provide the reinstated employee with work?

As a general rule, reinstatement does not oblige the employer to provide the employee with work to do. It merely entitles the employee to his or her salary and benefits upon tendering services. This position was put as follows in *Commercial Careers College (1989) (Pvt) Ltd v Jarvis*:⁵⁰

I would, however, add a caveat: 'reinstatement' in the context of this case means no more than a directive that the employee be replaced in her post. It does not entail the further obligation on the part of the employer to provide work for her, because there is no term in their contract of employment requiring it to do so.

This general rule does not apply in contracts of employment whose very nature requires the employer to provide work so as to enable the employee to derive benefits contemplated by the employment relationship.⁵¹

The absence of an obligation on the employer to provide work cannot be used to deprive the employee of contractual benefits that go with the office of the employee. The employee is entitled to the benefits – even those that are performance-related – because it is the employer who has

48 *Maguchu v Lever Bros (Pvt) Ltd* 2000 (2) ZLR 187 (S).

49 1997 (1) ZLR 357 (H).

50 *Supra* at p. 350G.

51 See *Muzondo v University of Zimbabwe* 1981 ZLR 33.

chosen not to provide work In *Standard Chartered Bank Zimbabwe Ltd v Matsika*,⁵² the employee had been reinstated ‘without loss of pay and other benefits from the date of his suspension without pay’. He was a manager of one of the branches of the bank. This position gave him status and entitled him to the use of a motor vehicle, payment of school and boarding fees for his children, an entertainment allowance and a share in the profits of the bank. The employer did not give him any work, but paid his salary. It refused to give him the other benefits, claiming that they were discretionary and performance-related. For example, the employer argued that since the motor vehicle was to facilitate travel from home to the workplace, it could not be given to the employee since he had not been given work to do. On the entertainment allowance, the employer argued that as this was for the entertainment of clients, the employee could not receive it because he had no clients to entertain. The Supreme Court dismissed the employer’s assertions and ordered the payment of all the benefits on the basis that the employer could not benefit from its own omission of not giving the employee work.

Where reinstatement is retrospective, it necessarily carries with it back pay for the period when the employee was not at work. Where the order of reinstatement is framed as follows – ‘with effect from the date of the dismissal and without loss of salary and benefits’ – it is, by implication, retrospective and carries with it back pay and benefits up to the date of the reinstatement order.⁵³

Is an employee entitled to refuse reinstatement and opt for damages instead?

In *BHP Minerals Zimbabwe (Pvt) Ltd v Takawira*⁵⁴ the employer agreed to pay the employee his wages from the time of his wrongful dismissal to the date of his reinstatement and to reinstate him. The employee refused to accept reinstatement and opted for damages. He claimed, as damages, the amount he would have earned over the remaining years of his working life. The Supreme Court held that while the employer had the option to choose to pay damages rather than reinstate the employee, the employee was not similarly placed. The court stated the law as follows:

52 1997 (2) ZLR 389 (S).

53 *Madyara v Globe & Phoenix Industries (Pvt) Ltd* 2002 (2) ZLR 269 (S); *ZUPCO v Daison* 2002 (2) ZLR 628 (S).

54 1999 (2) ZLR 77 (S).

an employee cannot choose, without justification, to refuse reinstatement and demand damages. The employee must have good reasons to refuse reinstatement. If the employee refuses a genuine offer of reinstatement, he abandons his claim for damages in respect of the period after the reinstatement was supposed to commence.

This position is correct only in cases where an employee, who initially asked for reinstatement, changes his or her mind after an order of 'reinstatement or damages' has been made and the employer has already opted for reinstatement. It cannot apply to prevent an employee from opting for damages at any stage of the dispute resolution process before a final decision is made. This is because, under the common law, the innocent party, in an action for breach of contract, is entitled to pursue a remedy of his or her choice. The Labour Act does not alter this principle.

This is a sound position of the law in the context of the objectives of the law on unfair dismissal. The basic objective is to enable employees to keep their jobs: it is not to enable employees to get compensation for breach of contract. An employee must have a good reason for refusing reinstatement. An example of a good reason is that the offer to reinstate is not genuine.⁵⁵ Another good reason is health-related incapacity.⁵⁶

This is supported by the wording of section 89(2)(c)(iii)(ii) where the preference of the employee is not an overriding factor in deciding whether or not to order reinstatement. It is merely one of the factors to take into account.

Are civil servants entitled to reinstatement?

The Labour Act does not apply to Public Service employees and the position discussed above as regards statutory reinstatement does not apply to them. The position of civil servants is governed by the common law, which has been favourable to them as regards reinstatement. The common law created an exception to its rule of denying specific performance in employment contracts to allow reinstatement of unlawfully dismissed civil servants, on the basis that they were governed by a particular statute.⁵⁷ This is still the position today.⁵⁸

55 *BHP Minerals Zimbabwe (Pvt) Ltd v Takawira (supra)* at 80C.

56 *Gauntlet Security Services (Pvt) Ltd v Leonard* 1997 (1) ZLR 583 (S).

57 See *Schierhout v Minister of Justice (supra)*.

58 See *Zimbabwe Teachers' Association & Ors v Minister of Education and Culture* 1990 (2) ZLR 48; *Chairman of the Public Service Commission & Anot v Marumahoko* 1992 (1) ZLR 304 (S).

Reinstatement and the Constitution

To the extent that the Labour Act's approach to reinstatement prevents a court from ordering reinstatement as the only remedy in appropriate cases, it is liable to challenge under the Constitution. It may be adjudged an infringement of the right to fair labour practices protected by section 65(1) of the Constitution. Fair labour practices seem to require either (i) reinstatement as a primary remedy, given that the employer is not only in breach of contract but has also acted unfairly, or (ii) that the court retains a discretion to order reinstatement as the only remedy in an appropriate case, without giving the guilty party an option to choose to pay damages. Why is an employee not entitled to reinstatement without an option to an employer to pay damages in those cases where the usual grounds for refusing reinstatement are absent? Take the example of a large enterprise or public body, where no personal relations arise between employer and employee and where reinstatement would not in any way prejudice the employment environment. Why is such an employer still given a choice to pay damages as an alternative to reinstatement?

The success of a constitutional challenge depends on the meaning of the concept of 'fair labour practice' in section 65(1). It is submitted that fairness requires striking a balance between the respective interests of both the employer and the employee and adding the interests of the public. There can be no fairness where the interests of one party are advanced at the expense of the other. The reference to 'every person' instead of 'every employee' is significant. It connotes fairness towards both employer and employee.⁵⁹ The South African Constitutional Court has made apposite observations on the right to fair labour practices as follows:

Our Constitution is unique in constitutionalising the right to fair labour practice. But the concept is not defined in the Constitution. The concept of fair labour practice is incapable of precise definition. The problem is confounded by the tension between the interests of the workers and the interests of the employers that is inherent in labour relations. Indeed, what is fair depends upon the circumstances of a particular case and essentially involves a value judgment. It is therefore neither necessary nor desirable to define this concept. The

⁵⁹ See generally *National Union of Metalworkers of South Africa v Vetsak Co-operative Ltd* 1996 (4) SA 577 (A) at 593G-H.

*concept of fair labour practice must be given content by the Legislature and thereafter gather meaning.*⁶⁰

A comprehensive definition of ‘fair labour practices’ must be avoided for now to allow a case by case development of the concept. After considerable ventilation in a number of cases, a firm definition may then be attempted. This approach has been followed in other difficult situations. Thus Ackerman J said of the ‘right to a fair trial’:

*The right to a fair trial is a comprehensive and integrated right, the content of which will be established on a case by case basis, as our constitutional jurisprudence develops. It would be imprudent, even if it were possible, in a particular case concerning the right to a fair trial, to attempt a comprehensive exposition thereof.*⁶¹

It is submitted that in many cases, international labour standards will provide a good indication of fair labour practices. Some of them may be less than fair, but it is inconceivable that a labour practice of less than international minimum standards can never be ‘fair’ within the contemplation of section 65(1).

It is further submitted that the Labour Act’s approach to reinstatement is contrary to section 65(1) of the Constitution. Giving the employer a choice, in every case, to opt for damages as an alternative to reinstatement does not strike the required balance between the employer and the employee. It is a pursuit of the employer’s interests at the expense of the employees. Fairness to both parties requires, at the very least, the court to retain a discretion as to whether to order reinstatement as the only remedy.

Re-employment

It is submitted that the reference to ‘reinstatement or employment in a job’ in section 89(2)(c)(iii) refers to two separate remedies, namely ‘reinstatement’ and ‘employment’. ‘Employment’ is not defined, but it appears clear that it includes what in other jurisdictions is called ‘re-employment’ or ‘re-engagement’.

Section 193 of the South African Labour Relations Act, 1996 puts

60 Per Ngcobo J in *National Education Health & Allied Workers Union v University of Cape Town* 2003 (3) SA 1 (CC), paras 33-35.

61 *S v Dzukuda & Ors; S v Tshilo* 2000 (2) SACR 443 (CC), paras 9 and 11.

‘reinstatement’ and ‘re-employment’ in a clear perspective and is worth reproducing for purposes of illuminating the point being made here:

Remedies for unfair dismissal and unfair labour practice

1. If the Labour Court or an arbitrator...finds that a dismissal is unfair, the Court or the arbitrator may...(a) order the employer to reinstate the employee from any date not earlier than the date of dismissal, (b) order the employer to re-employ the employee, either in the work in which the employee was employed before the dismissal or in other reasonably suitable work on any terms and from any date not earlier than the date of dismissal, or (c) order the employer to pay compensation to the employee.

Re-employment has been explained as follows:

A re-employment order implies the statutory imposition of a new relationship which may be different from the old one. The employee may be given the old job but without the rights, such as seniority rights, which had been acquired in terms of the old employment contract. It may also mean that the employee is given another job that differs from the old one. If the employee is appointed to a different position than the old one, section 193(b) requires only that it must be ‘reasonably suitable work’. The employee may be appointed to this new position on any terms.⁶²

In British labour law, the remedy is called ‘re-engagement’:

Re-engagement resembles reinstatement in its effect except that the employee does not necessarily return to the same post. The job must be comparable and suitable, and so far as is reasonably practicable as the previous position. It may, however, be with an associated or successor employer...⁶³

The remedy of ‘re-employment’ remains unexplored in Zimbabwe. Should there be an interest in developing it, there is much to be said for drawing lessons from South African and British labour law.

Damages

⁶² Basson (2009), p. 378.

⁶³ Honeyball and Bowers (1992), p. 170.

General Principles

There is no statutory concept of damages. This is unlike ‘reinstatement’ which is the statutory equivalent of ‘specific performance’. Damages referred to in the Labour Act have the meaning and import derived from the principles of the common law. Although damages are provided for as a remedy under labour legislation, it is trite that the calculation of these damages is governed by the common law.⁶⁴

The first categorical statement on the assessment of damages for unlawful dismissal in Zimbabwe was enunciated by Gubbay CJ in *Gauntlet Security Services (Pvt) Ltd v Leonard*.⁶⁵

*The employee is entitled to be awarded the amount of wages or salary he would have earned save for the premature termination of his contract by the employer. He may also be compensated for the loss of any benefit to which he was contractually entitled and of which he was deprived in consequence of the breach. But the employee must mitigate his loss. He must look for and accept any reasonable offer of alternative employment. He cannot just do nothing ... If he fails to take other employment when it would have been reasonable for him to do so, a deduction will be made in respect of the remuneration he would have earned from the substituted employment.*⁶⁶

This is no more than the position obtaining in the assessment of damages for breach of contract in general.

A direct consequence of this approach is that the damages must arise *ex contractu*. Damages arising *ex delicto*, such as where the employee is suing the employer for loss of future earnings owing to an injury sustained as a result of the negligence of the employer, are not claimable in an action for unlawful dismissal. In the *Gauntlet Security Services* case itself, the Labour Relations Tribunal had awarded the employee, as part of his damages for unlawful dismissal, what it termed ‘loss of future

64 See *Leopard Rock Hotel Co. (Pvt) Ltd v van Beek* 2000 (1) ZLR 251 (S) at 255C.

65 1997 (1) ZLR 583 (S).

66 At p. 586 C-E. The main authorities relied upon by the Supreme Court were *Myers v Abramson* 1952 (3) SA 121 (C) at 127C-E; *Willenburg v Pickstone & Brother Ltd* 1922 CPD 13 at 14; *Brown v Sessell* 1908 TS 1137 at 1143.

earnings' arising from the injury suffered by the employee in the course of his employment. This was set aside by the Supreme Court as not arising out of the unlawful termination of the contract of employment.

The above statement of principle in *Gauntlet Security Services* is easy to state but difficult to apply in practice. It raises various issues which have been dealt with in subsequent cases in a manner which is less than satisfactory. In *Reserve Bank of Zimbabwe v Siwawa's Estate Executor*,⁶⁷ the Supreme Court emphasized that the correct measure of damages is not what has been termed 'surrogate damages', being 'damages which are substituted for specific performance, and which amount to the same sum as would flow from an order for reinstatement in employment'⁶⁸

Mitigation of loss

The correct measure of damages requires taking into account the issue of mitigation of loss, i.e. reducing damages by taking into account any remuneration earned in other employment, or what would have been earned in other employment had the employee utilized the reasonable opportunities which existed. The duty of the employee to mitigate his or her loss was given an emphatic seal by McNally JA in *Ambali v Bata Shoe Co. Ltd.*⁶⁹

*I think it is important that this court should make it clear, once and for all, that an employee who considers, whether rightly or wrongly, that he has been unjustly dismissed, is not entitled to sit around and do nothing. He must look for alternative employment. If he does not, his damages will be reduced. He will be compensated only for the period between his wrongful dismissal and the date when he could reasonably have been expected to find alternative employment.*⁷⁰

The mitigation need not be employment-related. In *Olivine Industries (Pvt) Ltd v Nharara*⁷¹ money earned 'repairing cellphones and selling tomatos' was a proper consideration for mitigation and had to be taken into

67 1999 (1) ZLR 185 (S).

68 See p. 189C. The term 'surrogate damages' was used in *Myers v Abramson* 1952 (3) SA 121 (C) at 127C.

69 1999 (1) ZLR 417 (S).

70 At pp. 418G-419A.

71 2006 (1) ZLR 203 (S).

account.⁷² Where reinstatement is no longer desirable owing to a breakdown of the employment relationship the court must simply order damages.⁷³

Does this duty arise in cases of unlawful suspension as distinct from unlawful dismissal? This was answered in the *Ambali* case (*supra*). If an employee who is on suspension is offered and accepts another job, he or she may be taken to have elected to terminate his or her contract of employment.⁷⁴ Accordingly, the duty to mitigate does not arise in cases of unlawful suspension, but only in cases of unlawful dismissal, where it arises immediately upon the dismissal.⁷⁵

It is clear from the formulation of the duty of mitigation of loss that it only exists where it is 'reasonable' for the employee to look for alternative employment. Further, the employee may only be said to have breached the duty where he or she fails to look for and accept any 'reasonable' offer of alternative employment. Everything hinges on 'reasonableness'. What is 'reasonable' in this instance? The answer is that whether or not anything is reasonable is a finding of fact by the court and this depends on the circumstances of each case.⁷⁶ It is now established that the onus is on the employer to show that the employee has, or should have, earned an income from some other source.⁷⁷

This remains the position of the law notwithstanding some confusing remarks by McNally JA in *Leopard Rock Hotel Co. (Pvt) Ltd v van Beek*.⁷⁸ In that case, Mrs van Beek was suspended on 4 January 1995 pending an application to a labour relations officer for her dismissal. Her dismissal was approved by both the labour relations officer and the senior labour relations officer. However, on appeal to the Tribunal, the tribunal reversed the decision and ordered her reinstatement or, alternatively, damages. It transpired that she had found alternative employment in January 1997 and so the Tribunal awarded her 'back pay' for 24 months, being the period between the day of her suspension and the date of her finding new employment. The employer appealed against this and argued

72 At p. 206F.

73 *Olivine Industries (Pvt) Ltd v Nharara* 2006 (1) ZLR 203 (S).

74 See *Zimbabwe Sun Hotels (Pvt) Ltd v Lawn* 1988 (1) ZLR 143 (S) at 153 A-B.

75 See *Ambali v Bata Shoe Co.* (*supra*) p. 419D.

76 See *Leopard Rock Hotel Co. (Pvt) Ltd v van Beek* 2000 (1) ZLR 251 (S).

77 *Nyaguse v Mkwasine Estates (Pvt) Ltd* 2000 (1) ZLR 571 (S).

78 *Supra*.

that there was no evidence that she could not have found a job earlier. Thus, the employer proceeded on the basis that Mrs van Beek had a duty to mitigate her loss as from 4 January 1995. On the other hand, counsel for Mrs van Beek argued that, after being suspended on 4 January 1995, she remained on suspension until she terminated the contract by taking other employment. She had no duty to mitigate her loss.

McNally JA rejected the employee's argument, and herein lies a potential source of confusion. One may see this rejection as an assertion that even an employee on suspension has a duty of mitigation. However, this is not what the judgment stands for. On the contrary, it accepts that an employee on suspension has no such duty. McNally JA merely rejected the notion that Mrs van Beek was on suspension and instead placed her in the category of employees who have been wrongfully dismissed. He reached this categorization by holding that once the labour relations officer approved the dismissal it became retrospective to 4 January 1995. When the labour relations officer's decision was upset on appeal, she did not revert to being on suspension, but became an employee who had been wrongfully dismissed on 4 January 1995. Thus she had a duty to mitigate her loss. In the words of the judge:

Nor do I accept that where an employee suspended in terms of the regulations or of a code of conduct is then dismissed, she reverts to being suspended if ultimately declared to have been wrongfully dismissed. Mrs van Beek was dismissed, retrospectively to 4 January 1995, when the hotel's application was approved by the appropriate labour relations officer. The fact that the labour relations officer's decision has been upset on appeal does not mean she reverts to being suspended. It means she was wrongfully dismissed.⁷⁹

What is problematic with this approach is that while dismissal may be made retrospective, there can be no basis for imposing the duty to mitigate in retrospect. The better view, it is respectfully submitted, is that in principle the duty to mitigate must arise from the date when the labour relations officer approved the dismissal, notwithstanding the fact that the dismissal may have been retrospective to the date of the suspension.

Given that no duty to mitigate arises for an employee on suspension, what happens if, while on suspension, the employee earns some income

⁷⁹ At p. 255B-C.

from temporary employment? Notwithstanding the absence of the duty to mitigate, any income earned must be taken into account because the principle involved is not one of ‘surrogate damages’ but actual loss suffered less any sum earned or that could reasonably have been earned.⁸⁰ In *Nyaguse v Mkwase Estates (Pvt) Ltd*,⁸¹ McNally JA added his own voice as follows:

*The point must be made that the Act is intended as a practical solution to labour problems. True, it is intended to favour workers, but not to the extent that they should be paid twice for the same period of work... Equitably, if someone has to lose, it must be the employer, who was in the wrong. But if the employee manages to find other work which pays just as well, why punish the employer and over-compensate the employee? We are not dealing with punitive damages.*⁸²

It has been said that:

*The onus is on the employer to show that the employee did not look for alternative employment or that he did not take up a good job when it was offered to him. Should there be no evidence to refute the employee’s evidence that he looked for employment without success he would be entitled to be awarded the amount of the salary and benefits he would have earned from the date of the wrongful dismissal to the date of the order for reinstatement less what he may have earned in temporary or intermittent employment.*⁸³

*If the employee has remained jobless, equity demands that the employer be the loser because it is the employer who is in the wrong.*⁸⁴

A finding that an employee failed to mitigate his or her loss is a finding of fact, not law.⁸⁵ In *Telecel Zimbabwe (Pvt) Ltd v Sibangani Mabore*⁸⁶

80 See in particular *Myers v Abrahamson* 1952 (3) SA 121 (C) at 127C-E.

81 2000 (1) ZLR 571 (S).

82 At p. 574D.

83 *Posts and Telecommunications Corporation v Swabata* SC 42/2003 at p.7

84 *Nyaguse v Mkwase Estates (Pvt) Ltd* 2000 (1) ZLR 571(S)

85 *Mukwenge v Clan Transport Co. (Pvt) Ltd*, 2001 (1) ZLR 199 (S).

86 SC 50/2013 at p.5

the dismissed employee produced, as evidence, e-mails in which he was applying for employment to prove that he had looked for employment without success. However, in each of his letters of application, he stated, 'Currently I am working in Nigeria as a Group Supply Chain Manager in limestone mining and cement processing plant.' The employer contended that the e-mails were evidence that the employee had secured another job. On his part, the employee said what was in the e-mails 'was not true but was only a way of looking for employment' and that he had, in fact, not secured any alternative employment. The Supreme Court accepted the e-mails as evidence that the dismissed employee had secured another job. Ziyambi JA said:

In my judgment, if the respondent told lies in the e-mails, then he is the author of his own dilemma. He represented to the addressees of the e-mails that he was employed. He now argues that these documents do not contain the truth. No basis has been established upon which this court could disregard the factual allegations set out in the e-mails in preference to his submissions to the contrary. The e-mails set out above clearly support the contention advanced by the appellant that by 7 July 2011, the respondent had obtained alternative employment.

Quantum of damages

How does one arrive at 'the amount of wages or salary the employee would have earned save for the premature termination of (his) contract'? In principle, by calculating the salary due to the employee for the unexpired period of the contract of employment. In contracts of no fixed duration, the unexpired period is not necessarily the date of retirement of the employee. It is the reasonable period it would take a person in the position of the dismissed employee to obtain similar employment.⁸⁷ What is reasonable in each case is a matter of fact and evidence must be led to establish the reasonable period.⁸⁸

To quantify damages on no evidence is to commit an error of law.⁸⁹ The Labour Act requires the measure of damages to be a specific amount

87 *Gauntlet Security Services (Pvt) Ltd* at p. 588.

88 *Ibid.*

89 *Ruturi v Heritage Clothing Company (Pvt) Ltd* 1994 (2) ZLR 374 (S) at 380F.

and not such expression as ‘two years back pay’ or ‘six months salary’.⁹⁰

Even where the contract is of fixed duration, it does not follow that the unexpired period for purposes of damages is the same length of time remaining up to the end of the contract. The same principle applies, namely the reasonable period it would take a person in the position of the dismissed employee to obtain similar employment.⁹¹ In *Maseko v Jongwe Printing*,⁹² the contract was for a three-year period but it was unlawfully terminated after 15 months. Although the contract still had 21 months to run, damages were only granted for 12 months on the basis that the period the dismissed employee could reasonably be expected to find alternative employment was 12 months.

Chinhengo J had the following to say:

*Most of the cases which have come before our courts and in which the question of mitigation of damages in employment contracts arose were not, as in the present case, concerned with fixed term contracts but with contracts for personal service of a continuing nature... Do the same principles apply to a fixed term contract as they do to an indeterminate contract of employment? It seems to me that they do... I therefore come to the conclusion that even where a fixed term contract of employment is involved, the principle that the plaintiff mitigates his damages applies.*⁹³

In most cases, however, the unexpired period of a fixed term contract may be a good measure of the period during which the dismissed employee could reasonably be expected to find alternative employment.

The courts have firmly held that the ‘amount’ of wages or salary used for assessing damages is the net, and not gross, amount for the period in question. Similarly, damages are mitigated by the net and not gross amount earned over the relevant period.⁹⁴ This is in line with compensating for actual loss. The rates used for wages, salary or benefits are those applicable at the time of dismissal and not those at the time of assessment by the court. This was expressed as follows by Cheda JA in *Olivine In-*

90 Ibid. See also *First Mutual Life Assurance Ltd v Muzivi* 2007 (1) ZLR 325 (S).

91 *Maseko v Jongwe Printing & Publishing Co. (Pvt) Ltd* 2002 (2) ZLR 571 (H).

92 2002 (2) ZLR 571 (H).

93 At pp. 577F-578H.

94 *Chiriseri & Ors v Plan International* 2002 (2) ZLR 261 (S); *ZUPCO v Daison* 2002 (2) (ZLR 628 (S).

dustries (Pvt) Ltd v Nharara:⁹⁵

*The respondent can only be compensated by an amount that should be calculated at the rates applicable at the time and not at today's rates or some future unknown rates. An order for payment 'at today's rates' is vague and inappropriate in the circumstances. Today's rates will obviously be very different from the rates that prevailed at the time.*⁹⁶

However, if the rates applicable at the time were in a currency no longer in use, damages will be assessed in the currency in use at the time of the assessment.⁹⁷

If a benefit, such as a bonus, is payable at the employer's discretion, it is not an entitlement to be included in the assessment of damages.⁹⁸

In assessing the quantum of damages, it must be borne in mind that damages are in two categories: damages that can be assessed with exact mathematical precision and those that cannot be so assessed. For those capable of exact mathematical precision, the employee must adduce sufficient evidence to enable the calculation to be made, such as providing rates of pay in a contract or collective bargaining agreement. For damages that cannot be assessed with exact mathematical precision, the assessment is not an exercise in guesswork. The employee must lead such evidence as is available to enable the court to quantify the damages. The award must be 'a fair approximation' of the 'mathematically unquantifiable loss'.⁹⁹

The importance of assessing damages on the basis of evidence was emphasized in *Redstar Wholesalers v Edmore Mabika*,¹⁰⁰ where Ziyambi JA said:

The Labour Court's approach was wrong and its consequent ruling grossly unreasonable. The court is not entitled to pluck a figure out of a hat because it is of the view that this figure 'meets the justice of the case'. Instead, the court is

95 2006 (1) ZLR 203 (S).

96 At p. 206G.

97 *Samanyau & Ors v Pleximail (Pvt) Ltd* 2011 (1) ZLR 527 (H); *Mpofu v Commissioner of Police & Anor* 2010 (2) ZLR 389 (H).

98 *ZUPCO v Daison* 2002 (2) ZLR 628 (S).

99 *Aaron's Whale Rock Trust v Murray & Roberts & Anor* 1992 (1) SA 652 at 655; *Heywood Investments(Pvt) Ltd t/a GDC Hauliers v Pharaoh Zakeyo* SC 32/2013 at p. 7.

100 SC 52/1995 at p. 6.

required to hear evidence as to how long it would reasonably take a person in the position of the dismissed employee to find alternative employment. The fact that the parties have led insufficient evidence to enable the court to arrive at an informed conclusion does not absolve the court from its duty to utilize its powers in terms of section 89(2) of the Labour Act by calling evidence in order to resolve the issue.

In *Nyaguse v Mkwasine Estates(Pvt) Ltd*,¹⁰¹ it was said:

If the Tribunal is forced to make an estimate, it must use information at hand, not simply pluck a figure from nowhere.

An example of a wild measure of damages is that appealed against in *PTC v Swabata*¹⁰² where it was said:

... the amount of salary and benefits he would have earned from the date of his wrongful dismissal to the date he would have been retrenched had he remained in employment plus the retrenchment package he would have been paid had he not been unlawfully dismissed.

The effect of alternative employment

An unlawful suspension of an employee is a repudiation of the contract of employment by the employer. If the employee takes alternative employment, that may be acceptance of the employer's repudiation.¹⁰³ An alternative job at a lower salary must only be relevant to reduce the damages payable and not to establish a measure of the length of time reasonably required to find a new job. It does not follow that any alternative employment will suffice for purposes of terminating entitlement to damages. In this respect *Duly Holdings Ltd v Spanera*¹⁰⁴ was wrongly decided. In that case, the employee found another job at a lower salary some five months after his dismissal. Without exploring the legal consequence of a new job at a lower salary, the Supreme Court simply awarded damages for a period of five months (that is, from date of dismissal to the date of finding the new job). In principle, the period could have been longer with the income earned from the lower paying job deducted from

101 2000 (1) ZLR 571(S) at 575D.

102 SC42/2003

103 *United Bottlers (Pvt) Ltd v Kaduya* 2006 (2) ZLR 150 (S).

104 2005 (1) ZLR 407 (S).

the overall sum. Assessment of damages is a matter of fact and only raises a question of law if it is wholly unreasonable, such as where it is made without evidence.¹⁰⁵

In *Tel-One (Pvt) Ltd v Zulu*,¹⁰⁶ the employee (Zulu), while on suspension, found a job at ZIMNAT. He worked for four and half months before the contract was terminated precisely because ZIMNAT had been advised that Zulu was still employed by Tel-One. Apparently, it was Tel-One who informed ZIMNAT that Zulu was still their employee, and was on indefinite suspension. The Supreme Court held that the employee terminated his employment when he took up employment with ZIMNAT. This is another case where the employment by ZIMNAT was such as not to evince an intention to abandon the main employment contract.

The duty of mitigation of damages merely requires the dismissed employee to make genuine efforts in looking for employment. The employee need not find employment. This is illustrated by *Fokoseni v Lobels Bakery*.¹⁰⁷ In that case Fokoseni was employed as a 'tea maker'. He was over 55 years old at the time of his dismissal. He possessed no special skills. He attempted to look for another job but failed. This was also partly due to what the court termed the 'harsh economic environment'. He had secured a casual job cultivating and working in other people's urban fields but had to stop it due to the long distances he had to travel between his house and the fields in question. On these facts, it was held that he had satisfied the requirements of the duty of mitigation and damages were awarded for six years.

It is not every alternative employment which repudiates the contract of employment. Where an employee on 'suspension without pay' takes a lower paying job or temporary employment, repudiation may not be the case and the employment contract is not terminated. This is because the essence of repudiation is that the act or conduct in question must evince an intention no longer to be bound by the contract. As was said in the English case of *Rubel Bronze & Metal Co. v Vos*:¹⁰⁸

In every case the question of repudiation must depend on the character of the contract, the number and weight of the

105 See *Chiriseri, Madyara and Redstar Wholesalers* cases (*supra*).

106 2005 (1) ZLR 133 (S).

107 2004 (1) ZLR 406 (S).

108 [1918] 1KB 322.

*wrongful acts or assertions, the intention indicated by such acts or words, the deliberation or otherwise with which they are committed or uttered, and the general circumstances of the case.*¹⁰⁹

An employee on suspension without pay who takes on a temporary job to make ends meet cannot be said, by that act alone, to be evincing an intention no longer to be bound by the employment contract. The situation is different if the employee is on suspension with full pay, as the act of taking on another job in such a situation may have no other reasonable justification outside a repudiation.

The approach of the Supreme Court of treating every case of a suspended employee taking on new employment as repudiation is clearly contrary to principle and is bad at strict law. The leading case relied on for this approach, *Zimbabwe Sun Hotels (Pvt) Ltd v Lawn*,¹¹⁰ does not support the proposition that every form of employment by a suspended employee is repudiation. The relevant passage by Gubbay JA is as follows:

*Plainly, the obligation of an employee who is placed under suspension to hold himself available to performing his duties if called upon to do so, is one which arises by operation of law. It is of no consequence therefore that no provision in that regard is contained in the contract of service, and it is not necessary for the employer at the time of suspension to so inform the employee.*¹¹¹

The crux of the matter is that the employee on suspension ‘must hold himself available to perform his duties if called upon to do so’. If the employee, despite being in a temporary employment, is able to be available to perform his duties when called upon to do so, there is no breach of the employment contract.

As a matter of common sense, an employee on suspension who is called back to work is entitled to a reasonable time to make himself available. This reasonable time, depending on the circumstances, may range from a matter of minutes to a few days. For example, it is perfectly acceptable for the suspended employee to breach the terms of his tempo-

109 Cited in Christie and McFarlane (2011), p. 538.

110 1988 (1) ZLR 143 (S).

111 At p. 150.

rary employment in order to be available to resume duties.

The better view of the law is that each form of employment by an employee on suspension without pay must be examined to assess whether or not it evinces an intention no longer to be bound. Such an intention is absent where the suspended employee on a temporary employment has the flexibility to be available to resume duties if called upon to do so. The only implication of temporary employment is that the earnings thereof would reduce any damages due to the employee.

In *Tel-One (Pvt) Ltd v Zulu*,¹¹² Chidyausiku CJ overstated the position of an employee on suspension. He said:

*An employee who is on suspension is under a legal obligation to avail himself for duty to his employer during the period of suspension and that if such employee takes employment during the period of suspension he repudiates his contract of employment.*¹¹³

The formulation is an overstatement in that it suggests that every form of taking up employment by an employee on suspension, including taking up temporary employment, repudiates the contract of employment. There is no basis in principle for such a position.

Where a dismissed employee finds and takes up a new job of a similar nature, or a job with a comparable salary and benefits, it follows that damages can, at most, only be assessed up to the point of taking up the new job. However, it is not automatic that damages are payable up to that point. They are only payable up to that point if the period to the point coincides with or is less than the period reasonably required by a person in the position of the dismissed employee to get similar employment. Thus if the new job is taken up much later than the reasonable period, damages will be limited to the reasonable period.

If a dismissed employee gets a new but lower paying job, damages are still assessed for the reasonable period, which may include the time the employee is already earning from the new job. The question of damages will be the difference between the earnings from the new job and what the employee would have earned from the old job.

An issue to take special note of in the assessment of damages is that of cases where an employee is suspended without pay pending discipli-

112 2005 (1) ZLR 133 (S).

113 At p.137.

nary proceedings. Two main scenarios arise. In the first, a hearing at first instance may find the employee not guilty and order reinstatement ‘without loss of salary and benefits’. In the second, a hearing at first instance may find the employee guilty and prescribe dismissal as a penalty. The employee appeals and the penalty of dismissal is overturned. An order of reinstatement ‘without loss of salary or benefits’ is then ordered by the appellate body. In both scenarios, there is a period of time between the suspension and the decision by the relevant authority or court either to dismiss or to reinstate the employee.

In the first scenario, the employee has no duty of mitigation while on suspension. In calculating damages in lieu of reinstatement, the length of time reasonably required to find alternative employment would, on the evidence, necessarily be longer than the period of suspension of the employee. This is because during the period of suspension the employee could not have been reasonably expected to find alternative employment. The whole period of suspension is automatically a component of the length of time. The evidence must seek to establish how much more time the dismissed employee would have required. Thus, if the decision to lift the suspension and reinstate the employee was made after the employee had been on suspension for two months without pay, it is automatic that the length of time for purposes of damages is a minimum of two months. If the evidence establishes that from the date of dismissal (in this case, the date of the refusal to reinstate or date of appeal against reinstatement) the reasonable period is 12 months, the two months must be added so that damages are awarded for 14 months.

The same approach applies with the second scenario. The only further point here is that, although dismissal is retrospective to the date of suspension, the date of dismissal for purposes of mitigation is the date of the decision by the first disciplinary authority.¹¹⁴ Thus, if the decision of finding the employee guilty and imposing dismissal as a penalty is made at first instance two months after the suspension of the employee without pay but is overturned on appeal twelve months later, the two months of suspension will remain an automatic minimum period for damages. If the evidence establishes that from the date of dismissal (in this case, the date of decision of the first disciplinary authority) the reasonable period is eight months, the two months must be added so that damages are

114 See the *Chiriseri*, *Madyara* and *Redstar* cases (*supra*).

awarded for ten months.

Where an employee starts by being on suspension pending a disciplinary hearing, the moment of dismissal for purposes of the duty to mitigate is not straightforward. If the employee is found not guilty and the suspension is lifted and reinstatement ordered, the moment of 'dismissal' for purposes of mitigation is the date of refusal by the employer to reinstate, whether or not the employer also appeals against the order. If the employee is found guilty and dismissed but appeals, and the dismissal is reversed, the date of 'dismissal' for purposes of mitigation is the date the penalty of dismissal was communicated by the first disciplinary authority. For example, if an employee on suspension is found guilty and dismissed by an authority in terms of SI 15/2006, and the dismissal is set aside by an arbitrator via section 93 of the Labour Act, the date of dismissal for purposes of mitigation is the date of dismissal by the authority in terms of SI 15/2006. This remains the date of dismissal even in a case where the dismissal is confirmed by the arbitrator but is set aside by the Labour Court. It is always the dismissal at first instance which is taken into account for purposes of the duty of mitigation.¹¹⁵

Where an employee is entitled to a benefit in kind, such as free accommodation, he or she must produce evidence showing how much it cost him or her to have alternatives of the same standard during the relevant period.¹¹⁶

'Damages' and 'damages in lieu of reinstatement'

Damages, as a remedy for unfair dismissal, arise in two situations. The first is where they are awarded, at the discretion of the adjudicating authority, as a more appropriate remedy than reinstatement. Here, the adjudicating authority considers reinstatement inappropriate and orders the payment of damages as the only remedy. The second situation arises by virtue of section 89(2)(c)(iii) of the Labour Act, which, as already indicated, provides:

In the exercise of its functions, the Labour Court may –

- (c) in the case of an application made in terms of subparagraph (ii) of subsection (7) of section ninety three, make an order for any of the following or other appropriate order –

115 Ibid.

116 See the *Madyara* case, *supra* at p. 275E.

- (iii) reinstatement or employment in a job provided that –
 - any such determination shall specify an amount of damages to be awarded to the employee concerned as an alternative to his reinstatement or employment.

The effect of this statutory provision is that whenever the court considers reinstatement as the more appropriate remedy and grants it, the employer must still be given the option to pay damages in lieu of reinstatement. Here damages are awarded as an alternative, and not as the primary, remedy. This arises from the fact that reinstatement is not allowed by our labour legislation to be the only remedy.

Whether damages are awarded in the first or second situation, the applicable principles for their assessment are the same. There is no basis for the suggestion that the quantum of damages awarded as an alternative to reinstatement must necessarily be higher than where damages are awarded as the only appropriate remedy. There is nothing in section 89 to support any such suggestion. The section does not deal with any principle of assessment of damages. It is exclusively concerned with ensuring that the employer always has the option of paying damages. Confusion has arisen from the suggestion that there are two types of damages, namely ‘damages in lieu of reinstatement’ and ‘damages’. The expression ‘damages in lieu of reinstatement’ does not appear anywhere in the Labour Act. It has misleading connotations. The Act uses the expression ‘damages... as alternative to... reinstatement’.¹¹⁷

An issue of importance that has caused a great deal of confusion is ‘back pay’, in cases involving the assessment of damages as an alternative to reinstatement. The genesis of this confusion appears to be following McNally JA’s remarks in *Leopard Rock Hotel Co. (Pvt) Ltd v van Beek*:¹¹⁸

... it seems to me that ‘back pay’ and ‘damages’ are indeed different concepts, but only in the sense that ‘damages’ is a wider concept. It will normally include back pay, but may include, for example, compensation for loss of promotion prospects, interest, and other elements ... ‘Back pay’ is thus a concept associated with reinstatement. If an employee is reinstated she will normally be awarded back pay. If she suc-

¹¹⁷ Section 89(2)(c)(iii)(i).

¹¹⁸ *Supra*.

ceeds in proving wrongful dismissal, but is not reinstated, she will be entitled to 'damages', a major element of which will be back pay. Perhaps, more correctly, one should say the damages will be assessed by reference to the back pay lost. But here the back pay will be limited to a period from the date of wrongful dismissal to a date by which she could, with reasonable diligence, have obtained alternative employment.¹¹⁹

The confusion mainly arises from the claim that 'damages' may include 'back pay', and that the 'damages' may be assessed by the 'back pay' lost. This is conceptually problematic. It is even more problematic when it is said that the 'back pay will be limited to a period from the date of wrongful dismissal to a date by which she could, with reasonable diligence, have obtained alternative employment'. This latter formulation is nothing but damages. Why use the word 'back pay'?

The confusion can easily be cleared up if note is taken of the two main remedies available for unfair dismissal: reinstatement or damages. Reinstatement may be prospective or retrospective. Where it is retrospective, it deems the employee to have been at work for the relevant period. It necessarily carries with it payment of salary and benefits for the period the employee is deemed to have been at work. That payment is, conceptually, the very essence of a retrospective reinstatement. It is the monetary implication of reinstatement. It is not damages but reinstatement.

It is that payment which has been called 'back pay'. Accordingly, 'back pay' is and must remain associated with reinstatement. Where there is no reinstatement, it is conceptually meaningless to refer to 'back pay'. Damages seek to put the dismissed employee in the position he or she would have been in had the employment contract been performed. What is 'back pay' in this scheme of things? Damages are assessed from the date of dismissal and are therefore always prospective. The language of 'back pay' must therefore disappear completely whenever the issue of damages is raised.

It is instructive, at this point, to examine a number of Supreme Court cases which have adopted the approach of 'back pay plus damages'. Three were decided in 2002, with all the judgments written by Sandura JA. The first, *Chiriseri & Ors v Plan International*,¹²⁰ involved damages

119 At 254H-256A.

120 2002 (2) ZLR 261 (S).

in lieu of reinstatement. The employees had been suspended without pay pending the employer's application to a labour relations officer for permission to dismiss them under SI 371/1985. The labour officer rejected the application and ordered their reinstatement 'without loss of salary and benefits with effect from the date of suspension' or alternatively that they be paid damages in lieu of reinstatement. They were suspended on 20 July 1994. The labour officer ordered their reinstatement on 29 March 1995. The employer did not want to reinstate them and opted to pay damages in lieu of reinstatement. The Supreme Court held that the employees were entitled to (i) back pay and benefits from 20 July 1994 to 29 March 1995, and (ii) 18 months' salary as damages for the premature termination of the contract of employment. 18 months was the period they reasonably needed to get employment. Sandura JA said:

In my view, where the order of reinstatement indicates that retrospectivity was intended, the damages to be paid in lieu of reinstatement must include back pay and benefits.¹²¹

The second case, *Madyara v Globe & Phoenix Industries (Pvt) Ltd*,¹²² was delivered on the same day as the *Chiriseri* case. Madyara was dismissed on 23 October 1996 following proceedings under a code of conduct. He appealed to the Labour Relations Tribunal. On 28 June 2000, the Tribunal ordered his reinstatement 'without any loss of salary or benefits with effect from the 23rd of October 1996' or alternatively the payment of damages in lieu of reinstatement. He was not reinstated and the Supreme Court awarded him (i) back pay and benefits from November 1996 to June 2000 and (ii) three years' salary 'being damages in lieu of reinstatement'. In the third case, *ZUPCO v Daison*,¹²³ Daison was dismissed on 23 April 1997 in terms of ZUPCO's code of conduct. He appealed to the Labour Relations Tribunal. On 9 April 2001, the Tribunal ordered his reinstatement 'with no loss of salary or benefits' or alternatively damages in lieu of reinstatement. The Supreme Court awarded him back pay and benefits from 23 April 1997 to 9 April 2001. It did not award any damages for the 'premature termination of his employment contract' because he had not made any claim in that regard. In *Redstar Wholesalers v Ed-*

121 At p. 265D.

122 2002 (2) ZLR 269 (S).

123 2002 (2) ZLR 628 (S).

more Mabika,¹²⁴ Mabika was dismissed on 12 February 1999. On 9 July 1999, the Local Joint Committee of the NEC for the Commercial Sectors ordered his reinstatement with 'full salary and benefits', a ruling that was confirmed by the Labour Relations Tribunal on 7 January 2003. The Supreme Court awarded him (i) back pay and benefits from 12 February 1999 to 9 July 1999, and (ii) 12 months' salary as 'damages'.

The essence of this approach is that where reinstatement has been ordered to be retrospective, damages in lieu of reinstatement must, as a rule, have two components: back pay and benefits, and damages for loss of employment assessed from the point where back pay ends. The net effect is that the question of damages in these cases is different from the quantum in cases where damages are awarded either as the only remedy or in lieu of reinstatement, which is not retrospective.

The approach has no basis either in the Labour Act or in principle. Damages are a monetary compensation for loss arising from breach of the contract of employment. In principle, this loss is the same whether damages are awarded as the only remedy or in lieu of reinstatement. From an analysis of the Labour Act, it is clear that the expression 'as an alternative to reinstatement' does not alter the character of the damages. As already noted, the Act simply seeks to give the employer a choice between two remedies: reinstatement or damages. The intention of the Legislature on this aspect is unashamedly pro-capital: the employer is given an option to pick a less onerous penalty for breach of contract. The history of this clause confirms this understanding. The clause was introduced in 1992 as part of ESAP's quest for 'labour market flexibility'.¹²⁵

The justification for this approach was given by Sandura JA in the *Madyara* case (*supra*) in the following words:

*As far as the back pay and benefits are concerned there is no cogent reason for distinguishing between an employee who is reinstated and one who is not, where the order of reinstatement has a retrospective effect. In my view, both of them are entitled to back pay and benefits. The only difference between them is that one gets his job back whilst the other is paid damages for the premature termination of his employment contract.*¹²⁶

124 SC 52/2005.

125 See Labour Relations Amendment Act, 1992, section 24.

126 At p. 273D.

Herein lies the fallacy. ‘Damages in lieu of reinstatement’ are not meant to put the employee in the position he or she would have occupied had the employer opted for reinstatement. That would make the damages ‘surrogate damages’, a concept which would require a specific legislative provision. In the law of contract, damages are not meant to put the innocent party in the position he or she would have occupied had specific performance occurred. Damages are not an inducement to perform.¹²⁷ Damages are meant to put the innocent party (the employee) in ‘the position he would have occupied had the contract been performed, so far as that can be done by the payment of money, and without undue hardship to the defaulting party’.¹²⁸ The two elements – so far as that can be done by the payment of money, and without undue hardship to the defaulting party – have ensured that damages are always different from specific performance. Accordingly, the suggestion by Sandura JA in this line of cases is contrary to clear principles of the common law on the assessment of damages. The courts have emphasized that damages for unlawful dismissal are not ‘surrogate damages’, i.e. damages which are submitted for specific performance and which amount to the same sum as would flow from an order for reinstatement in employment.¹²⁹ The approach of ‘back pay’ plus ‘damages’ appears to be predicated on the need to place the dismissed employee in the same position as would flow from reinstatement. This does not appear to be the intention of the proviso in section 89(2) (c)(iii) where the focus is on giving the employer a choice between two remedies: reinstatement or damages.

More fundamentally, this approach is anchored on the distinction between retrospective and non-retrospective reinstatement. This distinction is not made in the Act. It is inconceivable that in insisting on an order of reinstatement being accompanied by a specification of an amount of damages to be awarded ‘as an alternative’, the Legislature had in mind two possible quantum of damages.

Damages are calculated as at the time performance is due, that is, the

127 *Woods v Walters* 1921 AD 303 at 309-310; *Bedford v Uys* 1971 (1) SA 549 (C); *ISEP Structural Engineering & Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd* 1981 (4) SA 1 (A).

128 *Victoria Falls & Transvaal Power Co. Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1 at 22.

129 *Gauntlet Security Services (Pvt) Ltd v Leonard* 1997 (1) ZLR 583 (S); *Reserve Bank of Zimbabwe v Siwawa's Estate's Executor* 1999 (1) ZLR 185(S).

date of the breach.¹³⁰ The concept of ‘back pay plus damages’ has no legislative basis. The Act refers to ‘damages’ which, in terms of principle, must be calculated from the date of the breach (in this case, the date of unfair dismissal). Another problem with this approach is that it contradicts the mitigation rule as spelt out in the line of cases led by *Gauntlet Security* and *Ambali*. As explained in those cases, the duty of mitigation arises immediately after dismissal. With the approach in those cases, there is no mitigation whatsoever on the ‘back pay’ component; mitigation only seems to arise with the ‘damages’ portion.¹³¹

Summary on damages

It is submitted, as a conclusion, that the law on damages for unlawful/unfair dismissal is as follows:

1. ‘Back pay’ is a concept only associated with reinstatement. If the remedy chosen is ‘reinstatement’ then ‘back pay’ arises. If the employer opts for damages as an alternative to reinstatement there must be no reference to ‘back pay’; the reference must be to damages only, because the remedy provided for in the Act is ‘damages’. There are two types of back pay associated with reinstatement, depending on the nature of the reinstatement.
 - (a) Where reinstatement is ordered in cases of ‘suspension without pay’, full back pay is payable. It is full in the sense that it covers the entire period of the suspension without pay, as there is no duty of mitigation. However, if despite the absence of mitigation, the employee earned some income while on suspension, but without repudiating the employment contract, the back pay will be reduced so as not to ‘over-compensate’.¹³²
 - (b) If reinstatement is ordered as a remedy for an unlawful dismissal, back pay is dependent on the duty of mitigation. Thus, despite reinstatement being retrospective, a dismissed employee’s duty of mitigation means that back pay will be reduced by any amount

130 *Rens v Coltman* 1996 (1) SA 452 (A); *Mostert NO v Old Mutual Life Assurance* 2001 (4) SA 159 (SCA) at 167.

131 See remarks by Sandura JA in the *Madyara* case, *supra* at p. 274.

132 *Nyaguse v Mkwazine Estates (Pvt) Ltd (supra)*.

(earned or which could have been reasonably earned between the date of the dismissal and that of the reinstatement.¹³³

- (c) Where the reinstatement is not retrospective, there is no back pay.

An example of where the concept of ‘back pay’ is correctly captured as a phenomenon associated with reinstatement is in SI 15/2006. Every order of reinstatement by a disciplinary authority ‘shall provide for back pay and benefits from the time of the summary suspension’.¹³⁴

There is reference to ‘back pay’ as one of the appropriate orders in section 89 (2)(c)(i). It is phrased as follows:

Back pay from the time when the dispute or unfair labour practice arose.

This provision has been part of the Labour Act since 1985 and has always appeared separately from ‘reinstatement’. It is concerned with ‘back pay’ in disputes other than dismissal, such as under-payments, improper grading of promotions, discrimination and related matters.¹³⁵

2. The quantum of damages is the same for the two situations: damages as the only remedy and damages in lieu of reinstatement. Damages are assessed from the date of dismissal even where they are awarded in lieu of reinstatement. The damages are calculated on the basis of the length of time, from the date of dismissal, which it would reasonably take the dismissed employee to find similar employment. As this is a matter of evidence, the results of any efforts of the dismissed employee in looking for employment may assist the court in establishing what is reasonable in the circumstances. For example, if 12 months have already passed between the date of dismissal and the date of hearing, and the dismissed employee shows that he or she has taken all reasonable steps to no avail, this may be an indication that a reasonable period in that case is more than twelve months.

133 *Leopard Rock Hotel v van Beek (supra)*.

134 See section 6(3) of SI 15/2006.

135 However, the courts wrongly regard it as a basis for ‘back pay’ in some cases of dismissal. See for example *BHP Minerals Zimbabwe v Takawira* 1999 (2) ZLR 77 (S) at 80B.

Punitive damages

There is provision for ‘punitive damages’. The Act does not define the nature and scope of these damages. *Black’s Law Dictionary* says the following about ‘punitive damages’:

*Damages awarded in addition to actual damages when the defendant acted with recklessness, malice or deceit ... damages assessed by way of penalizing the wrongdoer or making an example to others.*¹³⁶

It is clear that their nature is to punish the employer, deter future wrongdoing and set an example to others. As such, their assessment is not a matter of fact but an exercise of a discretion in making an award which best expresses the moral condemnation. The principles applicable in assessing the quantum of such damages must be the same as those that guide the courts in assessing *delictual* damages in the *actio injuriarum* (such as damages for defamation). This entails taking into account the moral blameworthiness of the employer’s conduct and any awards in comparable cases. In the end, it is about awarding a reasonable amount having regard to the circumstances of the case in the light of the purpose of the legislative provisions. As this is additional to actual damages, the amount of punitive damages can only be moderate.

In what circumstances are punitive damages awarded? The circumstances are specified in section 89(2)(c)(iii). A careful reading of the provision shows that punitive damages only arise where the court has ordered ‘damages only’ as a remedy. They do not arise in cases where reinstatement has been ordered and damages are specified in lieu of reinstatement. There is a three-stage process. First, the court must decide whether to award damages or order reinstatement.¹³⁷ In making this decision, focus is on whether or not the employment relationship is still tenable. If the conclusion is that the employment relationship is no longer tenable, reinstatement must not be ordered. Instead, damages must be awarded as the only remedy. Conversely, if the employment relationship is still tenable, reinstatement may be ordered, in which case damages will also be awarded in lieu of reinstatement and punitive damages do not arise.

The second stage only arises if the conclusion is that the employment

136 Garner (2004), p. 418.

137 Section 89 (2)(c)(iii)(ii).

relationship is no longer tenable and damages have been ordered. The question at this stage is: Is the untenable working relationship arising from the unlawful or wrongful dismissal by the employer? If the answer is No, *cadit quaestio*. Punitive damages do not arise. If the answer is Yes, the third stage arises.

At the third stage, the question is: Is this an appropriate case for punitive damages? This question arises because the Act does not make the imposition of punitive damages automatic. The use of the word ‘may’ clearly points to discretion. There would be many cases where punitive damages may be inappropriate, notwithstanding the fact that the untenable working relationship arises from the unlawful or wrongful dismissal of the employee. A court, in its discretion, may feel that the actual damages awarded are not only more than adequate but also have an unintended punitive effect. If the court concludes that it is an appropriate case for punitive damages, the process goes to the last stage. The last stage involves an assessment of the quantum of those damages.

The scheme of the provisions is that it is not competent to have an order in the following manner: ‘reinstatement or alternatively damages plus punitive damages’.

There may be cases where the untenable working relationship is arising partly from the unlawful or wrongful dismissal by the employer and partly from other factors, including the conduct of the employee. To get a Yes answer to the question posed here, the unlawful or wrongful dismissal by the employer must be the sole or main cause of the untenable working relationship. It must be the dominant cause.

FREEDOM OF ASSOCIATION AND THE RIGHT TO ORGANIZE

10.1 Freedom of Association: General Aspects

Freedom of association has two main aspects. The first is that it protects the freedom of the individual to form, join or participate in the activities of an association. It is well established that this does not mean the freedom to associate with a particular association: that is to say it is not a right to become a member of a particular association.¹ What has been less obvious is whether or not the negative freedom not to associate is necessarily covered by the freedom itself. Among the major international human rights instruments, only the Universal Declaration of Human Rights and the African Charter on Human and People's Rights specifically protect the freedom not to associate.² In national constitutions, most countries in southern Africa do not enshrine a negative freedom to associate.³ Be that as it may, the weight of international human rights jurisprudence favours the view that the negative freedom not to associate is necessarily implied

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- 1 See European Commission of Human Rights in *Cheall v UK* No 10550/83 42 DR 178 at 185 (1985).
 - 2 See Article 20(2) of the UN Declaration of Human Rights and Article 10(2) of the African Charter on Human and People's Rights.
 - 3 Only Zimbabwe specifically protects the negative freedom.

by the very notion of freedom of association and is thus covered.⁴

The second aspect of the freedom of association is that it protects the association itself, once formed, from undue interference by the State. The freedom entitles the association to run its own internal affairs without outside interference. This includes the association's right to determine its own management rules, to solicit membership and to make its own decisions. In the United States, the Supreme Court has held that a compulsion for the disclosure of an association's membership list in circumstances where disclosure would subject the members to various reprisals is an infringement of freedom of association of the members and the association.⁵

Does the freedom of association oblige the State to ensure that every association is recognized by law as a body corporate? It is submitted that for freedom of association to be effective, an association must enjoy legal personality and be able to act independently. This requires the State to put in place a legal framework (be it common law or statute or both) which facilitates the formation and legal recognition of associations.⁶ This does not mean that the State has a positive obligation to ensure that every association is recognized by law as a body corporate, merely that it must avail a legal framework which enables individuals to form associations which are recognized by law. However, even where such a legal framework exists, the mere fact that an association has not attained legal personality does not mean that freedom of association has been infringed.

Another question is whether or not the freedom of association exists for every purpose sought to be pursued by individuals who come together. In principle, the freedom of association is available regardless of the purpose or goals sought to be pursued. It is contrary to the essence of the freedom for the State to prescribe the kind of objectives or goals for which freedom of association is available. Given that freedom of expression protects the expression of unpopular views, such as rac-

4 See *Young, James & Webster v UK* (1982) 4 EHRR 38 (European Court of Human Rights); *Abood v Detroit Board of Education* 431 US 209 (1977); *Lavigne v OPSEU* (1991) 81 DLR (4th) 545 (Canada); *Law Society of the Transvaal v Tloubatla* 1999 (11) BCLR 1275 (T).

5 See *NAACP v Alabama* 357 US 449 (1958).

6 See Harris et al. (2009), p. 423.

ism, the formation of organizations to advance such views is protected.⁷ However, where the State prescribes certain purposes to be illegal, this amounts to a restriction of the freedom and can only be upheld if it passes the test of being reasonable and necessary in a democratic society.⁸

The next question concerns the nature of the organization that deserves to be called an 'association' for purposes of the protection offered by the freedom. This is mainly relevant where it is the 'association' itself seeking to enforce freedom of association, say by insisting on non-interference in its internal affairs. While no specific form is required, it is submitted that the grouping, even where it is informal, must have some identifiable structure which makes it possible to separate it from its members.⁹ Further, the grouping must have been consciously formed for some common objective or goal: a *de facto* relationship, such as between prisoners or employees of a company, does not constitute an 'association'.¹⁰

Restrictions on freedom of association are dealt with in exactly the same way as restrictions on freedom of assembly; they must be 'prescribed by law' and be 'justifiable in a democratic society'. There are two particular restrictions to freedom of association.

The first is the banning of an association, which in a lesser form takes the route of the State preventing the formation of an association. The proportionality test will make it difficult for such forms of restrictions to survive scrutiny. However, where an association exists to engage in serious criminal activities or where a political association seeks to subvert the democratic order, the proportionality test may lean in favour of an outright ban or prevention of the formation of the association. To be acceptable, the legislation facilitating the ban must not create room for arbitrariness.

The second form of restriction relates to the issue of interference with the internal affairs of the association. As already noted, an important aspect of freedom of association is associational autonomy, namely that an association is entitled to pursue its activities without outside interference. This entails that, in general, the association must be free to run its admission and expulsion rules and provide for its own internal decision-mak-

7 See the American case of *Brandenburg v Ohio* 395 US 444 (1969) which allowed the Ku Klux Klan to articulate publicly its racist and anti-semitic beliefs.

8 See generally *Lavis v France* No 14223/88 70 DR 218 at 234-239 (1991).

9 Harris et al. (1995), p. 421

10 See *McFedy v UK* No 8317/78, 20 DR44 at 98 (1980).

ing processes. It is not uncommon for the State to interfere with certain internal issues, with the main justifications being the need to ensure a commitment to internal democracy, the prohibition of unfair discrimination and the protection of the minority from abuse by the majority.

Such interferences may pass the proportionality test and may therefore be legitimate. For instance, rules requiring trade unions to adopt constitutions with certain mandatory provisions as a way of promoting internal democracy and accountability are legitimate. In some countries, there are rules which regulate the internal processes of political parties and these tend to be controversial, but there is merit in regarding such rules as legitimate where they require political parties to follow democratic processes in the election of leaders and candidates for public office.¹¹

An example of an excessive interference in the internal affairs of an organization is provided by the Private Voluntary Organisations Act¹². Section 21 of that Act empowers the responsible Minister to ‘suspend all or any of the members of the executive committee of a registered organization if he or she receives information showing that it is necessary or desirable to do so in the public interest’. This section was challenged as being an infringement of freedom of association in *Holland & Ors v Minister of the Public Service, Labour and Social Welfare*¹³ when the Minister suspended the executive committee of the Association of Women’s Clubs. The Supreme Court decided the matter on a different point, relating to infringement of the right to a fair hearing and left open the question of breach of freedom of association. It is submitted that the section is in breach of freedom of association in that it gives the Minister arbitrary powers over a matter which is central to the autonomy of associations, namely an association’s right to determine its own leadership.

A restriction under this head may also take the form of a requirement that an association be registered before it can operate. Such a restriction may only pass the proportionality test if there are clear dangers in allowing unregistered organizations to operate or the registration regime is too restrictive.

11 See *Smith v Allwright* 321 US 649 (1944); *Terry v Adams* 345 US 461 (1953).

12 Chapter 17:05.

13 1997 (1) ZLR 186 (S).

10.2 Trade Union Freedom: General Aspects

A well established aspect of freedom of association is the freedom to form and to join trade unions. Trade union freedom has been described as a 'special aspect of the freedom of association.'¹⁴ The central question with regard to trade union freedom is: what does it entail? Does it cover certain rights which are essential for the effective work of trade unions, such as the right to strike? The European Court of Human Rights has addressed this question in a number of cases and has held that freedom of association, in so far as it relates to trade unions, only covers those rights which can be regarded as indispensable for the exercise of the freedom.¹⁵ The only right regarded by that Court as indispensable for the effective enjoyment of freedom of association by a trade union is the right to be heard by the employer on behalf of its members.¹⁶ The following rights have been rejected as being neither indispensable for the effective enjoyment of the freedom nor necessarily inherent in the notion of a freedom of association for trade unions: the right to be consulted by the employer, the right to engage in collective bargaining and the right to strike.¹⁷

The approach of the European Court of Human Rights is supported elsewhere and thus the weight of international human rights jurisprudence appears to be that trade unions cannot rely on mere freedom of association to extract fundamental rights like right to strike and right to engage in collective bargaining.¹⁸ To enjoy the latter rights, more specific provisions are required. This concept of freedom of association has been embraced by Zimbabwean courts.¹⁹

Given the special nature of trade union freedom, the issues of the negative freedom not to associate is complex in labour relations. It raises two questions. First, does the State have a positive duty to prevent pri-

14 Reid (1998), p. 228.

15 See *National Union Belgian Police v Belgium* 1 EHRR 518 (1975); *Swedish Engine Drivers Union v Sweden* EHRR 617 (1976).

16 Ibid.

17 Ibid. For the right to strike, see *Schmidt & Dahlstrom v Sweden* 1 EHRR 632 (1976) where the court sounded sympathetic to the view of the right to strike as indispensable.

18 See the discussion and cases referred thereto in Madhuku (1995), (1997).

19 See *Zimbabwe Banking & Allied Workers' Union & Anor v Beverley Building Society & Ors* 2007 (2) ZLR 117 (H); on appeal 2010 (1) ZLR 292 (S).

vate persons from infringing other individuals' freedom of association? Secondly, are there situations in which denial of the freedom not to associate may not be regarded as an infringement of the freedom of association? Both questions arise with 'closed shop' arrangements. A closed shop is an arrangement between an employer and a trade union whereby all employees within a particular workplace are required, as a condition of their employment, to be members of a given trade union. Regarding the first question, there is no doubt that the State has a positive obligation to ensure that private persons do not infringe the right to freedom of association.²⁰ This infringement may come either in the form of a closed shop or where exclusion or expulsion from membership of a trade union is not in accordance with rules or is based on arbitrary provisions.

The second question has arisen in cases where it has been argued that a closed shop, given the peculiarities of labour relations, may not be an infringement of the freedom of association. The position from case law appears to be this: the issue in each case is to determine the extent to which the compulsory membership strikes at the very substance of freedom of association. In other words, compulsion to join a trade union may or may not lead to infringement of the freedom of association. It will be regarded as an infringement where it strikes at the very substance of the freedom, as was the case in *Young, James & Webster v UK*.²¹ In that case, the closed shop was applied to workers who were already in employment and had been employed before the arrangement came into force. Further, the employees were strongly opposed to trade union membership, the consequence of refusal to join was dismissal and there was no provision that the employees in question could form their own union.

It will be regarded as not an infringement where it does not strike at the very substance of freedom of association, such as was the case in *Sibson v UK*,²² where the employee, on refusal to join, was moved to another workplace on almost similar terms and conditions of employment and his contract of employment permitted transfers. On this approach, it is arguable that where non-members are forced to make contributions to a trade union from whose bargaining services they have benefited, there

20 See *Young, James & Webster v UK* (*supra*); *Sibson v UK* (*supra*).

21 Ibid. See also *Sigurjonsson v Iceland* 16 EHRR 462 (1993) where compulsory membership of a taxi association was nullified.

22 17 EHRR 193 (1993).

is no infringement of freedom of association, because being forced to pay for a benefit cannot be said to strike at the very substance of the freedom. In any event, it cannot be said that one is being forced to belong to a trade union merely by contributing to collective bargaining processes, as this does not involve any association with a political or ideological position. Collective bargaining is now deeply rooted in the employment relationship.²³

It is submitted that this approach of seeking to find no infringement on the basis of 'not striking at the very substance of the freedom' is misguided. An infringement is an infringement, whatever its extent. The better approach is to regard every infringement as an infringement and then seek to uphold some infringements which satisfy the proportionality test. Thus, a closed shop is an infringement of freedom of association but may, in given circumstances, be justifiable in the public interest and may be upheld if it satisfies the proportionality test.

Some countries exclude certain categories of workers from the freedom to form or join trade unions of their choice. This exclusion is normally applied to the army and the police. Article 11(2) of the European Convention allows 'lawful restrictions' on the exercise of the freedom by 'members of the armed forces, of the police or of the administration of the State'.

The inclusion of members of 'the administration of the State' makes this Convention oppressive. Indeed, in the famous case of *Council of Civil Service Unions v UK* (the *GCHQ* case)²⁴, the Commission of Human Rights upheld a law that denied trade union freedom to Public Service employees working at a UK communications interception station. The law in question only allowed the employees the right to be members of an approved staff association, which had much less impact than a trade union. The International Labour Organisation (ILO) does not accept such

23 See the American case of *Aboud v Detroit Board of Education* 431 US 209 (1977) where the court held that compulsory union dues for collective bargaining purposes did not infringe freedom of association. See also the Canadian case of *Lavigne v OPSEU* 1986 (33) DLR (4th) 174, where the court rejected a claim by a union member that mandatory union dues collected by his collective bargaining unit compelled him to associate with the political causes pursued by the trade union, thereby infringing his freedom of association. One judge was of the view that mere contribution of union dues does not lead to an association with the views ultimately pursued by the trade union.

24 No. 11603/85, 50DR 228 (1987).

wide restrictions on trade union freedom. In its Convention on Freedom of Association, it allows restrictions to be imposed on the armed forces and the police but not employees involved in ‘the administration of the State’²⁵. This means that, apart from the police and members of the armed forces, all employees must be allowed to form or join trade unions of their choice.

Recent developments in human rights jurisprudence signal a trend where even the exclusion of the armed forces and the police from trade union membership may be regarded as not reasonably justifiable in a democratic society. In the case of *South African National Defence Union v Minister of Defence*,²⁶ the South African Constitutional Court declared unconstitutional a law that outlawed trade unions in the Defence Force as being contrary to section 23 of the South African Constitution, which grants every worker the right to ‘form and join a trade union’; the question before the court was whether or not the prohibition applied in respect of members of the armed forces was justifiable in a democratic society. The court said it was not justifiable, as mere membership of a trade union cannot, in itself, lead to indiscipline. An instructive passage from O’Regan J’s judgment reads as follows:

*This case is concerned primarily with the right to form and join trade unions. Section 126B(1) constitutes a blanket ban on such a right. There can be no doubt of the constitutional imperative of maintaining a disciplined and effective Defence Force. I am not persuaded, however, that permitting members of the Permanent Force to join a trade union, no matter how its activities are circumscribed, will undermine the discipline and efficiency of the Defence Force. Indeed, it may well be that in permitting members to join trade unions and in establishing proper channels for grievances and complaints, discipline may be enhanced rather than diminished.*²⁷

25 See ILO Convention 87 of 1948, Article 9(1), which provides as follows: ‘The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations.’

26 1999 (4) SA 469 (CC).

27 Para 35.

10.3 The right to form or join a trade unions in Zimbabwe

Constitution of Zimbabwe, 1980

The 1980 Constitution guaranteed the freedom of association, which includes the right to form or join a trade union. This was enshrined in the Bill of Rights in section 21, which provided, in subsections (1) and (2), as follows:

- (1) Except with his own consent or by way of parental discipline, no person shall be hindered in his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to political parties or trade unions or other associations for the protection of his interests.
- (2) The freedom referred to in subsection (1) shall include the right not to be compelled to belong to an association.

Constitution of Zimbabwe, 2013

Section 65 of the 2013 Constitution provides a comprehensive set of labour rights, which include the right to form or join a trade union of one's choice.²⁸

In addition to labour rights in section 65, there are two other fundamental rights which have a direct bearing on trade union rights: sections 56 (equality and non-discrimination) and 58 (freedom of assembly and association). A number of issues arise from the fundamental rights in the Constitution. First, the right to form and join trade unions is given to 'every person' except members of the security services. It is not restricted to employees. Thus, a person need not be employed in order to exercise the right to form or join or participate in the lawful activities of a trade union.

Secondly, the right to participate in collective job action, including the right to strike, is only available to an 'employee'. It is not given to 'every person'. It is not available to a 'trade union'. Accordingly, a trade union *qua* trade union cannot claim a constitutionally protected right to strike.

Thirdly, the specific exclusion of members of the security services is not a prohibition; it merely means that they do not enjoy a constitutional

28 See the full text in Chapter 1.

protection of the right to form and join trade unions of their choice. It is permissible for subordinate legislation to grant them the right if the Legislature so decides.

Fourthly, a trade union is given the rights to engage in collective bargaining and to 'organize'. The word 'organize' is not defined and its import appears to be broad, but in the context in which it appears, it does not include a right to strike to facilitate 'organizing'. It must be taken to include the right of access of employees to the workplace. It may also include a right to a check-off system.

Fifthly, the freedom of association in section 58, which includes a right not to associate with others, means that trade unions have an absolute right to decide on their membership provided they do not infringe section 56 which prohibits unfair discrimination.

Labour Act

To entrench the freedom of association of workers vis-à-vis employers, the Labour Act takes the matter further. Thus in section 4, it provides in full as follows:

- (1) Notwithstanding anything contained in any other enactment, every employee shall, as between himself and his employer, have the following rights –
 - (a) the right, if he so desires, to be a member or an officer of a trade union;
 - (b) where he is a member or an officer of a trade, the right to engage in the lawful activities of such trade union for the advancement or protection of his interests;
 - (c) the right to take part in the formation and registration or certification of a trade union;
 - (d) the same rights, *mutatis mutandis*, as set out in paragraphs (a), (b) and (c) in relation to workers committees.
- (2) Every employee shall have the right to be a member of a trade union which is registered or certified, as the case may be, for the undertaking or industry in which he is employed if he complies with the conditions of membership.
- (3) No term or condition of employment and no offer of

employment shall include a requirement that an employee or prospective employee shall undertake –

- (a) if he is a member or officer of a trade union or workers' committee, to relinquish his membership or office of such trade union or workers' committee; or
 - (b) not to take part in the formation of a trade union or workers' committee; and any such requirement shall be void.
- (4) Without prejudice to any other remedy that may be available to him in any competent court, any person who is aggrieved by any infringement or threatened infringement of a right specified in subsection (1) shall be entitled to apply under Part XII for either or both of the following remedies -
- (a) an order directing the employer or other party concerned to cease the infringement or threatened infringement, as the case may be;
 - (b) an order for damages for any loss or prospective loss caused either directly or indirectly, as a result of the infringement or threatened infringement, as the case may be.

Some general points emerge from these provisions. First, the employee is not restricted to membership of a registered trade union nor is he or she only entitled to be a member of a trade union which is registered for the undertaking or industry in which he or she is employed. The right in section 4(1)(a) exists whether or not the trade union is registered. It also exists whether or not it is a trade union registered for the undertaking or industry in which the employee is employed.

The employer has no right whatsoever to determine the trade union which an employee may join. This latter point is aptly illustrated by the case of *POSB v Chimanikire & Ors.*²⁹ The applicant was a new statutory corporation which had been created out of another statutory corporation, the Posts and Telecommunications Corporation (PTC). The workers of the applicant were, before the applicant became a separate business entity, employees of the PTC. All the workers were members of the Zimba-

²⁹ 2005 (1) ZLR 285 (H).

bwe Posts and Telecommunications Workers Union, a trade union registered to cover all the workers of the PTC. The first two respondents were the general secretary and the president of the trade union. As a result of its new status, the employer (applicant) regarded itself as being in the banking industry and no longer in the telecommunications industry. The employer unilaterally stopped deducting trade union dues from its employees on the basis that the trade union, not having been registered for the banking industry, was no longer the appropriate trade union for its employees. In other words, it was the contention of the employer that the trade union could no longer effectively represent the interests of its employees. The employer sought the authority of the Minister of Labour to uphold its decision to stop deducting trade union dues. The Minister refused. The employer appealed to the Labour Court. The Labour Court dismissed the appeal. The employer took the matter to the High Court. It again lost the case. In the High Court, Makarau J endorsed the following observations made by the Labour Court which illustrate the essence of section 4(1)(a):

The Minister refused to ratify the position taken by the applicant on the basis that the appellant, as the employer, cannot decide which trade union the employees should belong to. The Minister noted that the employees still wanted to belong to the Respondent in line with their freedom of association. The appellant did not challenge the fact that its employees still wanted to belong to the Respondent. Its main argument being that the Respondent no longer represents its employees' interests who are not in the banking industry. That may well be so, but that, in itself, does not give the applicant the right to dictate which union its employees should belong to. That was the basis of the Minister's decision which we agree with.³⁰

An employee is thus entitled to join even a trade union registered for an industry or undertaking different from the one in which he or she is employed.³¹

Secondly, if there is already in existence a trade union registered for the undertaking or industry in which the employee is employed, the Act

³⁰ 287H-288A.

³¹ *Zimbabwe Banking & Allied Workers' Union & Anor v Beverley Building Society & Ors* 2010 (1) ZLR 292 (S).

gives the employee a right to be a member of that trade union provided he or she complies with the 'conditions of membership'.³² This provision is designed to build strong trade unions, thereby making trade union freedoms meaningful by providing an easy avenue for workers to join existing trade unions. As long as there is a statutory right to join an existing trade union, there is little to be gained from forming a new trade union. *Prima facie*, this entitlement of an employee to the membership of an existing trade union is an infringement of the freedom of association in so far as it takes away the discretion of a trade union to decide its membership.

It is submitted that such an infringement is permitted by the Constitution. It is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, dignity, equality and freedom. On what basis can it be justifiable to deny membership to an employee who is employed in the industry or undertaking for which the trade union is registered if he or she complies with the conditions of membership?

Thirdly, an employee cannot agree to waive his or her right to form or join or participate in the activities of a trade union.³³ The characterization of any contractual provision purporting to be an employee's waiver of his or her trade union rights as 'void' means that this is an absolute prohibition. Even where the agreement can be said to be 'genuine', it is still void. This is a measure to protect workers from the power of capital: it is often the case that a worker desirous to get or keep a job may be tempted to give away his or her fundamental rights. Here, labour law insists on the minimum right of human dignity.

Fourthly, every employee, including a manager, is entitled to form or join a trade union. Old restrictions relating to 'managerial employees' were removed in 2002. Before 2002, section 45 of the then Labour Relations Act prohibited a trade union from representing 'managerial employees'. In the Labour Relations Act, 1985, a 'managerial employee' was defined to include:

an employee, the nature of whose employment involves him in a confidential relationship with his employer in relation to matters affecting the rights and interests of other employees.

This definition did not purport to be exhaustive and left the ordinary,

32 Section 4(2).

33 Section 4(3).

popular meaning as the ruling definition. This meant that only employees with real or substantial managerial functions were covered. To this extent, their exclusion from trade union membership did not pose a serious threat to the size and strength of trade unions. The 1992 amendments widened the definition of managerial employee by repealing the above definition and replacing it with the following:

‘managerial employee’ means an employee whose contract of employment requires or permits him to hire, transfer, promote, suspend, lay off, dismiss, reward, discipline or adjudge the grievances of other employees, or to make recommendations on these matters to his employer.

This definition captured a substantially wider group of employees. In particular, employees without real managerial functions, that is, those who could not be called managers by popular definition, were brought within the definition of ‘managerial employee’ and denied the right to belong to trade unions. That is now repealed. Although the distinction between managerial and non-managerial employees was removed in relation to trade union membership, it still remains regarding membership of workers’ committees.³⁴ In removing the prohibition relating to trade union membership by managerial employees, the Legislature may have doubted its constitutionality following the Supreme Court judgment in *Ngulube v ZESA & Anor.*³⁵ In that case, a managerial employee challenged the constitutionality of the old section 45(1)(b)(i), arguing that it was in contravention of the freedom of association enshrined in section 21 of the Constitution of Zimbabwe. On a technicality, the Supreme Court avoided making a ruling on the matter. It held that the applicant did not have a sufficient interest in the matter to ground *locus standi*. In the same matter, the Supreme Court defended the distinction between managerial and non-managerial employees regarding workers’ committees and upheld its constitutionality. However, the fact that it left open the question regarding trade union membership may have persuaded the Legislature to drop the prohibition altogether.

The distinction between managerial and non-managerial employees is sound in principle, and ensures that workers at senior levels of management do not, through conflict of interest, undermine the interests of other

³⁴ See below.

³⁵ 2002 (2) ZLR 335 (S).

workers. Excluding members of senior management from membership of the same trade union as ordinary workers may not be unconstitutional.

Fifthly, the Act affords workers access to a speedy resolution of any infringement or threatened infringement of trade union rights.³⁶ Access is granted to a labour officer and thereafter to either an arbitrator or the Labour Court. There are two remedies available to the employee: an order directing the employer to cease the infringement, and an order for damages for any loss or prospective loss arising from the infringement. Either or both may be available in any one case.³⁷ Action by a worker to protect his or her rights is made easier by the Act labelling the infringement by the employer 'an unfair labour practice'.³⁸ This label achieves two purposes. It subjects the employer to the moral indignity of being the committer of 'unfair labour practices', and gives the employee a basis to utilize the labour dispute resolution machinery in Part XII of the Act. It is the machinery in Part XII that gives access to a labour officer and thereafter either an arbitrator or the Labour Court.

The opening of section 4(4) is significant. The expression 'without prejudice to any other remedy that may be available to him in any competent court' means that access to the High Court is still available to any worker who may wish to approach that court for the enforcement of the rights in section 4 of the Act.

10.4 Formation and Registration of Trade Unions

Formation

The formation of a trade union is a separate act from its registration under the Labour Act. A trade union, once formed, may either seek registration or choose to exist as an unregistered trade union. The act of formation of a trade union is no different from that of the formation of any other voluntary association, such as a church or political party. It is governed by the common law and its cornerstone is the agreement of the founders. It involves a group of people coming together and agreeing to form a voluntary association. Although the agreement need not be in writing, the most common practice is to have it evidenced by the adoption of a written document, such as a constitution. Under the common

36 Section 4(4).

37 Ibid.

38 Section 8 (a) and (b).

law, an association is not automatically regarded as a separate legal *persona*. To be a separate legal *persona*, it must graduate into a common law *universitas*.³⁹

The Labour Act does not prescribe any minimum number of persons required to form a trade union. This means that the common law rule applies, namely that two or more persons may form a trade union. For an association to be a trade union for purposes of the Labour Act, it must meet the requirements of the definition of ‘trade union’ in section 2, which defines a trade union as ‘any association or organization formed to represent or advance the interests of any employees or class thereof in respect of their employment’.

According to this definition, what makes an association a trade union is its purpose. It is not about the status of the persons forming the trade union. In theory, any two or more persons may form a trade union as long as the purpose is as contemplated by the Act. This also means that a person who is not employed may participate in the formation of a trade union and may be a member of a trade union. The purpose must be to represent or advance the interests of employees ‘in respect of their employment’. This is a restricted purpose. Interests of employees outside employment are not covered. Similarly, the interests of persons who are not employed cannot be the focus of a trade union.

Further, the trade union that the Labour Act regulates must be formed by a group of ‘employees’. Although the Constitution gives ‘every person’ the right to form and join a trade union of their choice, it is only ‘employees’ who may form a trade union that is recognized by the Labour Act. This does not mean that a trade union whose membership includes non-employees is not recognized by the Labour Act. The Act requires employees to be the dominant component of the group.

It is not unconstitutional for the Labour Act to restrict its scope to trade unions formed by ‘employees’ – because its purpose is to regulate the employment relationship.

Registration

Is it compulsory to register a trade union in Zimbabwe? The strict legal position is that it is not compulsory. However, section 30 of the Labour Act imposes a number of restrictions on unregistered trade unions, while section 29(4) grants a comprehensive set of benefits to a registered trade

39 Discussed below.

union. The effect of this approach by the Act is to make registration virtually compulsory if a trade union is to perform its duties effectively. This is because the benefits granted by section 29(4) are essential in the life of any trade union. This raises a fundamental question: Are these restrictions on unregistered trade unions not too broad so as to infringe the labour rights protected by section 65 of the Constitution? In other words, are the registration requirements in the Labour Act constitutional? The Constitution allows deviations from the fundamental rights granted by it, if the deviation is 'reasonable, necessary and justifiable in a democratic society'. The question therefore is: Is it reasonable, necessary and justifiable in a democratic society to put restrictions on unregistered trade unions? It would appear that the mere fact of requiring registration is not unconstitutional because it is a common feature of most democracies. The ILO has not condemned it. However, some restrictions may be unconstitutional, such as the ban on collection of unions dues or the ban on recommending a strike.

The law and procedure of registration may be summarized as follows:

1. Every trade union, whether registered or not, must adopt a written constitution within six months of its formation. A trade union cannot raise funds from any source before adopting that constitution.

2. After the adoption of a written constitution, the trade union must submit two copies of the constitution to the Minister of Labour. This must be done within six months of its formation and this obligation arises whether or not the trade union is registered.⁴⁰ In a clear indication that the State regulates all trade unions, whether registered or not, section 28 of the Act specifies compulsory provisions for the constitution of every trade union:

- the qualifications for membership, including membership fees, if any;
- the right of any person to membership if he is prepared to abide by the rules and conditions of membership;
- the number of officials and office bearers, their powers and their appointment or election;
- the holding of annual general meetings;
- the call and conduct of meetings;
- the prohibition of discrimination against any member or class

40 Section 28(3).

of members;

- the amendment of the constitution;
- the winding up the trade union.

3. Every trade union desiring registration must apply for registration by submitting an application to the Registrar of Labour Relations in the prescribed form.⁴¹ The application must be accompanied by a copy of the constitution and details of the scope of the trade union and the anticipated sources of funds for its operations.⁴² The details include:

- (a) the name of the trade union or employers organization or federation; and
- (b) the names and relevant particulars of the persons intending to secure the registration; and
- (c) the coverage of the proposed trade union or employers organization or federation with regard to the undertakings or industries concerned, with such exclusions as may be intended; and
- (d) the affiliates to, and the affiliations of, the trade union or employers organization or federation, including international, national or local unions, organizations or workers' communities; and
- (e) sources of funds and materials, both current and anticipated, for organizing the trade union or employers organization or federation, and the address of its bank.

The Labour Act prescribes a minimum set of provisions which must be contained in the constitution of every trade union that seeks registration. These are in addition to those which every trade union, whether registered or not, must have in its constitution in terms of section 28. The additional minimum provisions for trade unions seeking registration are contained in section 35 and include (i) consultation between the various governing bodies or branches of the trade union before entering into a collective bargaining agreement or recommending collective job action, (ii) keeping of books of accounts and the submission of such books of accounts for auditing, (iii) the prohibition of the use of union or association dues of the trade union for electioneering for the trade union or for political purposes, (iv) the maintenance of a register of members, (v) the

41 Section 33.

42 Section 34.

equitable sharing of the funds of the trade union with the branches of the trade union, and (vi) the giving to any person who is refused membership or who is expelled of written reasons for such refusal or expulsion.

4. On receipt of the application, the Registrar is required to publish a notice in the *Gazette* inviting any interested persons who wish to make any representations regarding the registration to do so within a period of not less than 30 days. The public must be given at least 30 days notice.⁴³

5. Accreditation proceedings may be held to determine whether or not a trade union may be registered. Accreditation proceedings are held for the purposes of determining whether or not a trade union should be registered.⁴⁴ It is not compulsory to hold them. They may be held in any one of the three circumstances:

- i) where the Registrar considers it desirable;
- ii) where the Minister of Labour directs that they be held;
- iii) where they have been requested by any interested person and approved by the Registrar.

6. After considering any representations made and after the holding of accreditation proceedings, if required, the Registrar may grant or refuse the application for registration. Where accreditation proceedings have been held, it is mandatory for the Registrar to notify all interested parties who appeared at the proceedings in writing of his decision, together with the reasons for the decision.⁴⁵

7. In granting or refusing registration the Registrar must take into account the factors mentioned in section 45. That section sets out the factors that the Registrar must take into account in determining whether or not to register a trade union. These include:

- (i) representations by employers and employees who might be affected,
- (ii) representations by the Minister of Labour,
- (iii) representations by any member of the public or any section thereof likely to be affected,
- (iv) the desirability of affording the majority of the employees

⁴³ Section 33.

⁴⁴ Section 41.

⁴⁵ Section 44.

and employers within an undertaking or industry effective representation in negotiations affecting their rights and interests,

- (v) the desirability of reducing to the least possible number, the number of entities with which employees and employers have to negotiate, and
- (vi) whether representations made at any accreditation proceedings indicate that the trade union will not be substantially representative.

When the Act was passed in 1985, section 45 also enshrined the principle of ‘one industry, one union’, by requiring the Registrar to ‘be bound by the general rule that there should be no more than one certified trade union or employers’ organization for each undertaking or industry’. It also prohibited a trade union from representing ‘managerial employees’. The ‘one industry, one union’ provision was removed by the 1992 amendments while the prohibition relating to ‘managerial employees’ was lifted by the 2002 amendments.

8. The Registrar’s decision whether or not to register a trade union after considering the factors in section 45 may be challenged in the courts. The Act grants to any person who is ‘aggrieved’ by the decision of the Registrar, the right to appeal to the Labour Court.⁴⁶ The Labour Court is empowered to confirm, vary or set aside the decision of the Registrar.⁴⁷

The law governing such appeals was explained by the Supreme Court in *Agricultural Labour Bureau & Anor v Zimbabwe Agro-Industry Workers’ Union*.⁴⁸ In that case, ZAWU, an unregistered trade union, applied for registration as a trade union. This application was opposed by GAP-WUZ, a trade union which was already registered and covered employees in the same agricultural sector that ZAWU sought to represent. It was also opposed by the employers’ organization in the sector. GAP-WUZ’s main grounds for objecting to the registration of ZAWU was that it already effectively covered the employees whom ZAWU sought to represent and that the emergence of a ‘splinter union’ would affect the management of the NEC for Agriculture. The employers’ organization

46 Section 47.

47 Section 49.

48 1998 (2) ZLR 196 (5).

Stated, in its objections, that the existing trade union, GAPWUZ, ‘had done an excellent job’ and it did not see any reason for a new trade union such as ZAWU. Notwithstanding these objections, the Registrar, after holding accreditation proceedings, decided to register ZAWU. An appeal to the Labour Relations Tribunal was unsuccessful. In a further appeal to the Supreme Court, the registration of ZAWU was set aside.

The Supreme Court stated that an appeal in this case was in the nature of a review, where the focus is on whether or not the Registrar made his or her decision properly in terms of the Act.⁴⁹ In determining this, the courts must take note of the fact that some of the decisions of the Registrar are policy decisions and not judicial ones. For example, whether or not it is desirable to have more than one trade union in a given industry is fundamentally a question of policy. However, in making that policy decision the Registrar must conduct himself in the manner prescribed in the Act. He must take into account the considerations set out in section 45. If he fails to take into account some of the considerations, the decision must be set aside.

In that particular case, the Supreme Court set aside the Registrar’s decision after reaching the conclusion that he had not complied with section 45 in the following respects (i) he had consulted neither the Minister of Labour nor the Minister of Agriculture as required by section 45(1)(a); (ii) he had not addressed the issue of the ‘desirability of reducing, to the least possible number, the number of entities with which employees and employers have to negotiate’ as required by section 45(1)(a), and (iii) he had not checked the figures of membership claimed by ZAWU and disputed by GAPWUZ and this failure meant that he could not comply with section 45(1)(a)(vi).

In *Automotive & Allied Workers’ Union v Motor Trade Workers’ Union*⁵⁰ the Registrar was held to have complied with all the requirements of section 45 and his decision to register a new trade union in the same industry was upheld. In that case, the Automotive & Allied Workers’ Union objected to the registration of a new trade union, the Motor Trade Workers’ Union. The Registrar rejected the objection and registered the new trade union. The first challenge against the Registrar was that he had accepted an unverified membership of the new trade union. This challenge was dismissed on the basis that the objecting trade union had

49 202E-G.

50 2006 (1) ZLR (S).

neither raised the issue with, nor asked for the verification of the membership by, the Registrar. The second challenge was that the Registrar had not taken into account the various considerations in section 45. The court dismissed this second challenge on the ground that the reasons given by the Registrar showed that he had taken all the considerations into account.

Where the Registrar has taken into account all the considerations set out in section 45, the decision itself, notwithstanding being a policy decision, may still be set aside on the ground of irrationality. The Registrar's decision is irrational if it is so outrageous in its defiance of logic that no reasonable Registrar, after having taken into account all the considerations in section 45, would have arrived at it.⁵¹

Some of the decisions by the Registrar under section 45 are findings of fact. For example, whether or not the trade union is 'substantially representative' depends on the Registrar's findings on membership levels. Findings of fact will not be set aside on appeal unless there is irrationality. In *National Union of Railwaymen v Zimbabwe Amalgamated Railways*⁵² the appellant union's registration had been rejected by the Registrar. In his reasons for rejecting the registration, he stated:

After having carefully examined the submissions made in the accreditation proceedings, and also taking note of the verification on NUR's membership that 99% of the people are still registered with ZARU, rendering NUR to virtually having no members, and also the fact that the interests that NUR wishes to cater for are the same with no distinction from that of ZARU, I came to the conclusion that NUR cannot be registered at this stage.

The finding that NUR had no substantial membership was a question of fact. This was not interfered with on appeal because it was not irrational. It was based on the Registrar's investigations.

10.5 Rights of registered trade unions

The main rights of registered trade unions are specified in section 29(4) of the Act. The discussion which follows focuses on the main rights.

1. The trade union as a body corporate

On being registered, a trade union becomes a person at law (body corpo-

⁵¹ Ibid.

⁵² SC 8/1996.

rate).⁵³ The main consequences of being a body corporate are that it can sue or be sued in its own name and can purchase or acquire, hold or alienate property (movable or immovable). More fundamentally, the concept of a body corporate makes the trade union a separate legal *persona* from its members. The trade union, on registration, becomes a 'juristic person that has legal personality distinct from the natural persons who make it up, exists indefinitely apart from them and has the legal powers that its constitution gives it'.⁵⁴ Section 29(2) provides as follows:

Every trade union, employers organization or federation shall, upon registration, become a body corporate and shall, in its corporate name, be capable of suing and being sued, of purchasing or otherwise acquiring, holding or alienating property, movable or immovable, and of doing any other act or thing which its constitution requires or permits it to do, or which a body corporate may, by law, do.

The importance of this provision is that registration on its own is all that is required to gain corporate status. However, this does not mean that an unregistered trade union may not become a body corporate. It may become one under the common law if it satisfies the requirements of being a *universitas*. A *universitas* is 'an aggregation of natural persons or individuals forming a *persona* or entity, having the capacity of acquiring rights and of incurring obligations, and having perpetual succession'.⁵⁵

The two main characteristics of a *universitas* are holding property apart from its members and perpetual succession. Any association that seeks to be regarded as a *universitas* must prove these two characteristics. It is not easy to discharge the burden of proof. Many unregistered associations or trade unions will not succeed and herein lies the privilege accorded by the Act in its automatic grant of corporate status to a registered trade union.

Without corporate status, an association cannot institute legal proceedings in its name. It has thus been held that a workers' committee, not being a body corporate under the Labour Act, can neither institute nor

⁵³ Section 29(2),

⁵⁴ Garner (2004), p. 365.

⁵⁵ Van Heerden et al. (1991), p. 241; Voet 1.8.28; 3.4.1, 2.

defend legal proceedings on behalf of workers.⁵⁶ This does not prevent a workers' committee, depending on how it has conducted its affairs over time, from proving that it is a universitas under the common law, thereby having the requisite corporate status to sue and be sued in its own name.

2. The trade union's entitlement to make representations to a determining authority or the Labour Court

This right is provided for in section 29(4)(d). It entitles a registered trade union to represent its members in proceedings before the Labour Court and any determining authority. The expression 'determining authority', although not specifically defined in the Act, refers to any entity or official in the Act clothed with some powers to determine an issue or dispute. Thus, the Registrar, labour officers, conciliators and arbitrators are determining authorities.

In *Communications & Allied Services Workers' Union of Zimbabwe v Tel-One (Pvt) Ltd.*⁵⁷ Makarau J said the following:

I note that section 29(2) of the Act clothes trade unions with corporate status and specifically provides that trade unions shall be capable of doing all such acts that are authorized by its constitution. The section proceeds in subsection (4)(d) to grant a trade union the right to make representations before any determining authority or the Labour Court.

In my view, the fact that the Act entitles a registered trade union with the right to make representations before any determining authority or the Labour Court does not limit it to that role only as suggested by Mr Hwacha. It appears to me that if its constitution authorizes it to sue and be sued on behalf of its membership, a trade union can bring or defend representative actions on behalf of its members. In my further view, section 29(4)(d) is expressly providing for a trade union to have a voice in labour disputes that are before determining authorities and the Labour Court, which voice may have been denied at common law and on the narrow construction of the general rule governing rules of procedure as to who may

⁵⁶ See *Cold Storage Co. National Workers' Committee v Cold Storage Co. Ltd* 2002 (1) ZLR 141 (H); *C.T. Botts v Workers' Committee* 2012 (r) ZLR 363 (s).

⁵⁷ HH 1991/2005.

*address a determining authority or court in formal hearings. It is my further view that, in addition to having a voice before a determining authority and the Labour Court, a trade union may be a party before this court as long as its constitution allows it to sue in the subject matter and as long as it can establish a standing before this court.*⁵⁸

An unregistered trade union has no right whatsoever to make representations before a determining authority or Labour Court. This is because both a determining authority and the Labour Court are creatures of statute and the right to make representations before them is also created by statute.

The emphasis by Makarau J in the above passage is unnecessary and risks being misleading. It is misleading in so far as it may be taken to suggest that the right of a registered trade union to make representations before the High Court is derived from an extension of its right in section 29(4)(d) to make representations before a determining authority or Labour Court. That is not the case. The right of a registered trade union to institute proceedings in the High Court arises from the fact of being a body corporate. Under our law, every person is entitled to approach the High Court. This means that even an unregistered trade union is entitled to approach the High Court as long as it is able to prove that it is a body corporate under the common law.

Two issues stand out regarding the institution of legal proceedings by a trade union before the Labour Court or the High Court. The first is the question of *locus standi*. It is trite that any person seeking redress before a court must have *locus standi*, namely a sufficient legal interest in the matter. The remarks by Makarau J in the *Communications & Allied Services Workers' Union* case suggest that the mere fact of registration of a trade union is in general sufficient to clothe it with *locus standi* to institute proceedings in defence of the interests of its members. In other words, the courts will be slow to deny *locus standi* to a registered trade union in any matter involving workers in its sector. With respect, this is a correct attitude and is consistent with the essence of trade unions. On appeal in *Tel-One (Pvt) Limited v Communications and Allied Services Workers' Union*,⁵⁹ Chidyausiku CJ decided the matter of *locus standi* on

⁵⁸ At p. 3.

⁵⁹ SC 26/2006.

a different ground and did not interfere with the attitude displayed by Makarau J. The attitude displayed by Makarau J is to be recommended. It should be highly exceptional to deny a registered trade union *locus standi* in proceedings involving the interests of workers in its sector.

The second issue relates to how a registered trade union may become party to proceedings before the Labour Court or High Court. The case of *Tel-One (Pvt) Ltd (supra)*⁶⁰ is instructive. In that case, the employer had suspended, without pay and other benefits, employees who were on strike and then charged them under its code of conduct with various cases of misconduct. Disciplinary proceedings were conducted in terms of the code, culminating in the dismissal of all the employees involved. The trade union, in response to the dismissals, immediately filed an application in the High Court for a review of the disciplinary proceedings that led to the dismissal of the employees. It instituted the proceedings in its own name and was the only applicant in the matter. The employer objected, *inter alia*, on a point *in limine*, challenging the legal competence of the trade union being a party to the proceedings. It was argued, on behalf of the employer, that the trade union could not institute a review application against proceedings to which it was not a party. In other words, a party that was not privy to the original proceedings cannot apply for the review of such proceedings. In the High Court, Makarau J rejected this argument and held that all that mattered was whether or not the trade union had demonstrated a sufficient legal interest to sustain the review proceedings. The technical point of whether or not it was party to the original proceedings was in itself irrelevant. The sole issue was one of *locus standi* and not the format of the proceedings. She expressed her position as follows:

The applicant has the statutory duty of protecting the interests of its members just like the Law Society of Zimbabwe and the Zimbabwe Teachers Association. The other two associations were held by this court to have sufficient standing to protect the interests of their members. I do not see a legal basis upon which I can treat the applicant differently in the circumstances of this matter. It is seeking to protect the rights of its members not to be treated unfairly by their employer in matters of discipline and collective job actions. It plays an

60 SC 26/2006.

*important role that is recognized by statute in both spheres of discipline and collective job actions. In conclusion therefore, it is my finding that the applicant has established a sufficient legal interest in the application to give it standing in the proceedings before me.*⁶¹

On appeal, Chidyausiku CJ rejected the above approach and endorsed the view that ‘a party that was not privy to the original proceedings cannot apply for the review of such proceedings’. He added: ‘The proposition that only parties to the proceedings can challenge on review or appeal the outcome of such proceedings admits of little doubt’.⁶²

However, he still reached a conclusion where he accorded the trade union *locus standi* by deeming the trade union to have been party to the disciplinary proceedings. He held the original disciplinary proceedings to have been ‘part and parcel of the ongoing dispute between’ the employer and the trade union (and employees).

The basis of the Supreme Court’s decision was that the trade union was, after all, a party to the original proceedings and was therefore entitled to institute review proceedings. This was a rejection of the High Court’s approach in that, without a finding that the trade union was a party to the original proceedings, the trade union would have been denied *locus standi*.

It is submitted that Makarau J was correct. Chidyausiku CJ misconceived the position of the law. It is trite that a review is different from an appeal. It is only in an appeal that proceedings are restricted to parties to the original action. In a review, any interested party may institute proceedings.⁶³

It is therefore correct that the sole issue for consideration whenever a trade union wishes to institute review proceedings is the question of *locus standi*. In other words, does the trade union have sufficient legal interest to institute the review proceedings? As already indicated, a registered trade union has close to what may be regarded as ‘automatic *locus standi*’ in any matter involving its members.

More fundamentally, the approach taken by Chidyausiku CJ would undermine the representation role of registered trade unions as envis-

61 At p. 5.

62 At p. 6.

63 See for example Welsh (1996).

aged in the Labour Act. In giving a registered trade union the right to make representations before a determining authority or Labour Court, the framers of the Labour Act were keen to ensure that a registered trade union had adequate scope to intervene, on behalf of its members, in labour disputes. Most labour disputes involve oppressive proceedings in the workplace. These workplace proceedings may involve hearings in terms of a registered code of conduct. One of the key roles of a trade union is to rescue workers from such oppressive workplace proceedings. The review procedure is a key weapon in this regard.

3. Right of access to employees at the workplace

The right of access to employees in the workplace enables a trade union to communicate with its members and to recruit new members. Without such an entitlement, a trade union cannot function effectively, because the workplace is the most convenient place to access workers. The authors of *Essential Labour Law* have stated:

The first problem faced by any trade union that wants to represent its members is that the union's officials must have access to employees who are already members of the union, as well as to employees who are prospective members and whom the union wants to recruit as members. The central issue here is contact between the trade union and its members or prospective members. The logical place for this contact is the workplace – this is the only place where union members are present for the largest part of a working day.⁶⁴

In terms of section 7(2) of the Act, a representative of an appropriate trade union is entitled to have 'reasonable' access to employees at their place of work and the employer is obliged, not only to permit this access, but also to grant 'reasonable facilities' for this purpose. If a registered trade union already has members in the workplace, this right of access is automatically available to it for purposes of holding meetings with its members and for doing all such things as enable the trade union to be of service to its members in protecting and advancing their rights and interests.

Where a registered trade union seeks to have access to employees who

64 Basson et al. (2009), p. 39.

are not its members, presumably for purposes of recruitment, it must be shown that the trade union is registered for interests which correspond most closely to those of the employees concerned.⁶⁵

The right of access to employees at their place of work is not unlimited. An employer is entitled to put restrictions which 'prevent any disruption of normal production processes or any interference with the efficient running of an undertaking or industry'.⁶⁶

Although not expressly stated in section 7(4), these measures must be reasonable. Examples of reasonable measures are (i) requiring the trade union to give the employer notice of its intended visits, such as 48 hours notice, (ii) specifying the place of the meeting within the premises, and (iii) agreeing on a set number of meetings per given period.

4. The right to levy and collect trade union dues

Section 29(4) merely gives a registered trade union the right to levy, collect, sue for and recover trade union dues. It does not prescribe the manner of collection; this is provided for in section 54(1) as follows:

- (1) Union dues shall be collected by an employer from his employees and transferred to the trade union concerned –
 - (a) by means of a check-off scheme or in any other manner agreed between the trade union and the employees and the employer or employers organization concerned; or
 - (b) failing such agreement as referred to in paragraph (a), by authorization in writing of an employee who is a member of the trade union concerned.

The Act defines a 'check-off scheme' as 'a scheme whereby an employer, with the consent of the employees concerned, deducts union dues directly from the remuneration of his employees and remits such dues to the trade union representing them'.⁶⁷

A 'check-off scheme' is a powerful weapon in the hands of a trade union, saving it from having to make arrangements with each member for the payment of his or her union dues. Unregistered trade unions are

⁶⁵ Section 2 for definition of appropriate trade union.

⁶⁶ Section 7(4).

⁶⁷ Section 2.

prohibited from using any check-off scheme⁶⁸ and this makes it difficult for them to survive without being registered.

Is the check-off scheme under section 54 available to every registered trade union? In *Zimbabwe Banking & Allied Workers' Union & Anor v Beverley Building Society & Ors*⁶⁹ it was held that the check-off scheme under section 54 is only available to a trade union which is registered for an undertaking or industry in which the employer belongs. It is not available where the trade union is registered for an undertaking or industry different from the undertaking or industry to which the employer belongs. In that case, the appellant trade union was registered to cover banking institutions. The first respondent (the employer) was a building society which belonged to the 'commercial sector'. The employees of the first respondent resigned from a trade union registered for the 'commercial sector' and joined the appellant trade union. The latter then invoked section 54 and demanded that the first respondent deduct trade union dues by means of a check-off scheme and pay the amounts to it. The first respondent refused on the ground that it had no obligation to do so since the appellant trade union was not registered to cover the commercial sector. On its part, the appellant trade union argued that the expression 'trade union concerned' in section 54 referred to any registered trade union to which the relevant employees belonged. The appellant trade union's argument was rejected, with the court holding that 'trade union concerned' meant the trade union registered for the industry or undertaking to which the employer belonged.

It is submitted that restricting section 54 to trade unions registered for the particular industry or undertaking to which the employer belongs may be unconstitutional as an infringement of the trade union's right to 'organize' protected by section 65(4) of the Constitution of Zimbabwe, 2013.

5. Right to determine and regulate its own membership

In essence, this right belongs to every trade union, whether registered or not. It is an intrinsic component of freedom of association. The relationship between a trade union and its members is governed by the constitution of the trade union. The constitution is part of the contract between a trade union and its members.

⁶⁸ Section 30(3)(c).

⁶⁹ 2010(1) ZLR 292(S).

Both registered and unregistered trade unions are prohibited from discriminating membership on the basis of race, tribe, place of origin, political opinion, colour, creed or gender.⁷⁰ It is also mandatory for every trade union to provide for AGMs and to call and conduct meetings of members.⁷¹ With registered trade unions, this right to determine and regulate their own membership is subject to one fundamental control which does not extend to unregistered trade unions, namely that every employee shall have the right to be a member of a trade union which is registered for the undertaking or industry in which he or she is employed as long as he or she is prepared to comply with the rules and conditions of membership.⁷² A registered trade union has no discretion to refuse membership of any particular employee in the undertaking or industry on a basis other than that he or she has not complied with conditions of membership.

6. Leave for trade union purposes

Membership of a trade union does not, in itself, entitle an employee to any leave to participate in trade union activities. The Act grants special leave on full pay for trade union purposes to an employee on condition that the employee is 'required to attend as a delegate or office-bearer' at a meeting of a registered trade union.⁷³ For this special leave to be granted, there must be a meeting organized by a registered trade union, and the employee seeking the leave must be either a delegate or office-bearer of the trade union. Leave for any other trade union activities cannot be claimed under section 14B(c). The maximum number of special leave days per year under section 14B is twelve. If the employee has used special leave days for the other specified purposes under the section, he or she can only utilize the remainder. If he or she has used all the special leave days on the other specified purposes, there will be no leave for trade union purposes under section 14B.

The Act provides a further avenue for officials or office-bearers of trade unions to have paid or unpaid leave during working hours to perform the functions of their office. Section 29(4)(a) directs trade unions and employers to provide for this matter in their collective bargaining agreements. If they fail to agree during the course of collective bargain-

70 Section 28(1)(b)(vii).

71 Section 28(1)(b).

72 Section 4(2) and 50.

73 Section 14B(c).

ing, the Act directs them to refer the matter to a labour officer. In other words, the Labour Act requires this matter to be addressed in every collective bargaining agreement.

7. The right to engage in collective bargaining

A registered trade union is given an automatic right to be recognized by an employer as a bargaining agent. The Labour Act makes it an 'unfair labour practice' for an employer not only to refuse to negotiate in good faith with a registered trade union but also to bargain with an unregistered trade union where a registered trade union exists for the employees concerned.⁷⁴ Fuller details on this right are discussed in the next chapter.⁷⁵

8. The right to engage in collective job action

No unregistered trade union may recommend collective job action.⁷⁶ Section 104(3)(c) states that:

Subject to subsection (4), no collective job action may be recommended or engaged in by any trade union, employers organization or federation unless the trade union, employers organization or federation is registered.

Fuller details on this right are discussed in Chapter 14.

10.6 Deregistration of a trade union

There are four situations in which a trade union may lose its registration.

1. In terms of section 39(1), any interested person, including the trade union itself, may apply to the Registrar for rescission of its registration. On receipt of such an application, the Registrar is required to publish it in the Gazette and to invite any interested persons to make representations on the matter within thirty days of the publication of the notice. After holding accreditation proceedings and considering any representations made, the Registrar may rescind the registration of the trade union.⁷⁷ Appeals against the Registrar's decision lie with the Labour Court.⁷⁸

2. In terms of section 39(2), the Minister may initiate the process of

⁷⁴ Section 8.

⁷⁵ Chapter 11.

⁷⁶ Section 30(3)(a).

⁷⁷ Section 40.

⁷⁸ Section 40(5).

rescission of registration. If the Minister is of the opinion that the trade union 'no longer adequately represents the interests or area for which it was registered or has failed to perform any of its functions', he or she may direct the Registrar to hold accreditation proceedings. On receipt of the Minister's directive, the Registrar is obliged to act as in (1) above. The decision whether or not to rescind the registration of the trade union in this case must be made by the Registrar. As in (1) above, appeals against the Registrar's decision lie with the Labour Court.⁷⁹

3 In terms of section 120, the Minister may appoint an investigator if he or she 'has reasonable cause to believe that the property or funds of any trade union ... are being misappropriated or misapplied or that the affairs of any trade union are being conducted in a manner that is detrimental to the interests of its members as a whole'. If the investigator recommends that the trade union be deregistered and wound up, it is up to the Minister to accept or reject the recommendation. If he or she accepts the recommendation, he or she shall make an application to the Labour Court. It is the Labour Court which has the final say on whether or not the trade union should be deregistered.⁸⁰

4. In terms of section 107, a disposal order issued by the Labour Court on the return day of a show cause order may provide for rescission of registration of the trade union involved in the collective job action.⁸¹ Here, deregistration occurs as a punishment for engaging in unlawful collective job action.

Employee Organizations at Shop Floor Level: Workers' Committees

Labour legislation provides for two shop floor institutions, namely works councils and workers' committees. The two are distinct. A workers' committee is an employee organization established by, and composed exclusively of, employees. It is provided for in terms of section 23 which grants to 'employees employed by any one employer' the right to 'elect a workers' committee to represent their interests'. The reference to 'employees employed by any one employer' means that a workers' committee is not necessarily a plant-level institution, in that where an employer has several plants or workplaces, only one workers' committee may be established. The operating sphere of the workers' committee is

79 Section 40 (5).

80 Section 120 (b).

81 Section 107(3)(a)(vi).

determined by the scope of the employer's enterprise.

The Act provides for two types of workers' committees. The first is composed of workers who are below the level of 'managerial employees'. The second is composed of managerial employees only. The proviso to section 23 (1) makes it clear that:

... no managerial employee shall be appointed or elected to a workers' committee, nor shall a workers' committee represent the interests of managerial employees, unless such workers' committee is composed solely of managerial employees appointed or elected to represent their interests.

The creation of two separate workers' committees is designed to promote representation of the interests of ordinary workers. Managerial employees have different concerns and tend to dilute the interests of ordinary workers. In the event of any dispute as to whether or not an employee is a managerial employee, the matter may be referred to the Labour Court.⁸²

In *Ngulube v ZESA & Anor*⁸³ the distinction between a managerial and non-managerial workers' committee was challenged as being unconstitutional on the basis of infringing section 21 of the 1980 Constitution. In that case, the applicant, who was employed in a managerial position, became a member of the respondent's non-managerial workers' committee. He was instructed to withdraw from the committee on the grounds that, as a managerial employee, he was ineligible. He refused and was, as a consequence, dismissed from employment following disciplinary proceedings. Apart from bringing an action before the Labour Relations Tribunal, he also brought a constitutional challenge arguing that his rights of freedom of association had been contravened by the proviso to section 23(1) of the Act. He contended that, regardless of being a managerial employee, he should nevertheless be allowed to be a member of a workers' committee for non-managerial employees. In not allowing him to do so, the proviso to section 23(1) infringed his freedom of association. All the five judges of the Supreme Court who heard this constitutional challenge concurred in dismissing it. Two grounds were relied upon. The first was that there was no infringement of freedom of association because the

82 Section 46 1)(b). See also *First Mutual Life Assurance v Muzivi* 2004 (1) ZLR 287 (S).

83 2002 (2) ZLR 335 (S).

effect of the proviso was merely to ensure that the interests of different workers were separately articulated and represented. The applicant was eligible to be a member of a workers' committee of managerial employees. The creation of different committees to deal with different categories of workers was not an infringement of freedom of association. The second ground was in the alternative. It was that, even if the proviso were interpreted as an infringement of the applicant's freedom of association, that infringement was a permissible derogation in terms of the Constitution itself for the 'purpose of protecting the rights or freedoms of other persons'.⁸⁴ Chidyausiku CJ had this to say:

*... it is logical to assume that non-managerial employees have the right to have their interests represented by those of their colleagues who share and therefore fully appreciate their needs and interests. The involvement of a managerial employee whose interests they may not share would, in my view, undermine such right. To that extent, the proviso to section 23(1) of the Labour Relations Act does make provision for the protection of the rights and freedoms of other persons, that is, the non-managerial employees. This means that the possibility of a conflict of interests where the same member of the workers' committee might seek to represent the interests of both management and workers is eliminated.*⁸⁵

With one exception, any employee employed by the relevant employer is entitled to be elected into the workers' committee. The exception was introduced by the Labour Relations Amendment Act, 2002 and relates to a situation where a registered trade union has a membership of not less than 50% of the employees of the employer concerned. In such a situation, only members of the trade union may be elected into the workers' committee. However, all employees, regardless of their trade union membership, will still be entitled to participate in the election as electors/voters. In other words, a non-trade union member is entitled to vote but not to hold office⁸⁶

The main role of the workers' committee is to represent the interests of all the employees concerned in any matter affecting their rights and

⁸⁴ Section 21(3)(b) of the Constitution.

⁸⁵ At p. 346 E-F.

⁸⁶ Section 23 (1b).

interests.⁸⁷ This includes negotiating with the employer concerned a collective bargaining agreement covering terms and conditions of employment⁸⁸ and recommending collective job action where appropriate.⁸⁹ A workers' committee is also entitled to elect some of its members to represent employees in the works council for the undertaking.

Unlike with a registered trade union, the Act does not specifically grant body corporate status to a workers' committee. This accounts for a major difference between a registered trade union and a workers' committee. Although section 24(1) empowers a workers' committee to 'represent the employees concerned in any matter affecting their rights and interests', the courts have said this cannot be taken to include the right to sue or be sued on behalf of the employees concerned. In *Cold Storage Co. National Workers' Committee v Cold Storage Co. Ltd.*,⁹⁰ the employer took steps to terminate the employment of certain employees in terms of what was termed a 'voluntary mutual separation agreement'. The workers' committee filed an application in the High Court seeking a declaration that the purported termination of employment be declared invalid and that the workers involved be reinstated. The employer countered by raising the question of whether or not the workers' committee had the legal capacity to sue. The workers' committee argued that it derived its authority from section 24(1). Kamocha J rejected the argument by the workers' committee and held that the workers' committee was not a legal *persona* and therefore could not sue or be sued on behalf of the workers involved. These were his words:

*The Legislature did not give the workers' committee the right to sue and to be sued like it did to the employment council. In s 60 of the Act, employment councils were made bodies corporate, capable of suing and being sued. It seems to me that if the intention of the Legislature was to make workers' committees legal personae, it would have said so.*⁹¹

This position received the endorsement of the Supreme Court in *CT*

87 Section 24.

88 Section 24 (1) (b).

89 Section 24 (1) (c).

90 2002 (1) ZLR 141 (H).

91 At pp. 142 H-143A.

Bolts (Pvt) Ltd v Workers' Committee,⁹² where Garwe JA said:

*The Act has not made provision for the workers' committee to operate as a legal persona. Had this been the intention, the Act would no doubt have said so. ... On a proper interpretation of s 24 of the Act, it is clear that a workers' committee exists to safeguard and champion the interests and welfare of the workers at the work place. It has no other function. There is no provision in the Act requiring a workers' committee to adopt a constitution. There is also no requirement for a workers' committee to acquire rights apart from the rights of the individuals forming it and the employees it represents. There is also no provision for a workers' committee to acquire assets in its own name.*⁹³

It is submitted that this lack of legal capacity only arises in cases where the workers' committee seeks to sue on behalf of employees. It must not arise where the workers' committee is resorting to legal action on behalf of itself in respect of disputes arising out of collective bargaining pursuant to section 24(1)(b) or of collective job action pursuant to section 24(1)(c). For these latter situations, it is implied by the Act that the workers' committee, notwithstanding not being a body corporate, has a status, *sui generis*, to be a party to legal proceedings. This is the basis, although not articulated, upon which the workers' committees in the following leading cases were party to legal proceedings: *Old Mutual v Old Mutual Workers' Committee*;⁹⁴ *Olivine Industries (Pvt) Ltd v Olivine Workers' Committee*⁹⁵ and *Thomas Meikle Centre (Pvt) Ltd v TM National Workers' Committee*.⁹⁶

This limited legal capacity is unavoidable. The Act empowers the workers' committee to engage in collective bargaining and to recommend collective job action. When negotiating or recommending collective job action, the workers' committee is acting as a separate entity from any of its members or workers represented by it. For example, the fact that it is entitled to bargain means it has the capacity to enter into agreements.

92 2012 (1) ZLR 363 (S).

93 At p. 365C-F. See also *Zimbabwe Bata Shoe Co. v Zimbabwe Bata Workers' Committee* SC 40/2012.

94 SC 257/1996.

95 2002 (2) ZLR 200 (S).

96 2002 (2) ZLR 502 (S).

Inevitably, it should be allowed within that limited framework to sue or be sued pursuant to matters arising therefrom.

The rigidity of the approach in the *CT Bolts* case, (*supra*), may complicate workplace labour relations. The Supreme Court appears to have dug a hole for itself. A way out may be that suggested, albeit *obiter*, by Ziyambi JA in *Gweru Water Workers' Committee v City of Gweru*⁹⁷ whereby a workers' committee which has a constitution may be regarded as a common law universitas. More fundamentally, even without a written constitution, a workers' committee which is able to demonstrate perpetual succession and is holding assets separate from its members must be regarded as a legal *persona* for purposes of dealing with disputes arising from collective bargaining and/or collective job action.

Membership of a workers' committee does not clothe an employee with immunity from charges of misconduct for unlawful acts or omissions arising from the employee's activities as a member of the workers' committee.⁹⁸ The facts of *ZESA v Mare*⁹⁹ illustrate this. Mare was a member of the workers' committee. He was representing two employees who were facing disciplinary proceedings at the workplace. In the course of this duty, he forcibly confiscated a report from another employee who was preparing it for submission to the employer for use as evidence in the disciplinary hearing of the two employees. Mare was charged with misconduct, convicted and dismissed. The Labour Court had accepted his explanation that he was merely discharging his duties as a member of the workers' committee. The Supreme Court disagreed and found him guilty. Chidyausiku CJ said:

In my view, members of the workers' committee are not a law unto themselves. The President of the Labour Court clearly misdirected herself in concluding that because the respondent was a member of the workers' committee he was entitled to take the law into his hands and obstruct the investigations that were being conducted by the employer. All these events happened at the workplace, in the course of employment and accordingly there is no basis for concluding, as the learned President of the Labour Court did, that these events occurred

97 SC 59/2013.

98 *ZESA v Mare* 2005 (2) ZLR 222 (S).

99 *Ibid.*

outside the scope and course of employment.

The South African Labour Appeal Court has gone much further, to give an employer the right to discipline an employee who, while performing his or her role as a negotiator, makes threats against the employer.¹⁰⁰ This is what the judges of that court said:

One cannot divorce the bargaining situation from reality. The negotiation pertains to the workplace and the employment situation. The employer negotiates as employer and the employee as employee and the fact that both negotiating teams represent their principals does not alter this. The fact that meetings often degenerate does not mean that one should jettison the principle that as in the workplace also at the negotiating table the employer and the employee should treat each other with the respect they both deserve. Assaults and threats thereof are not conducive to harmony or to productive negotiation. Of course the criminal law can be invoked should there be a criminal act, but that is the last thing one looks for in the bargaining process. Of course the refusal to negotiate further in the face of abuse is an option, but why should the inhibitory effect of possible disciplinary action in the case of serious transgressions not be allowed to lubricate the process into civility? To me it is unacceptable to hold, as the commissioner did, that when one acts in a representative capacity anything goes.¹⁰¹

Workers' Committees and shop floor employee institutions in other systems.¹⁰²

In other systems, the most common shop floor employee institution is that of shop stewards. The system of shop stewards lies at the core of the British industrial relations system. South Africa follows this British system, which has spread to other industrialized countries. A shop steward is an employee at the workplace who is elected or appointed to represent a trade union and carries out functions assigned to him or her

100 *Adcock Ingram Critical Care v Commission for Conciliation, Mediation and Arbitration & Ors* (2001) 22 ILJ 1799 (LAC).

101 *Ibid* at p. 15.

102 For a survey of shopfloor employee institutions in Southern Africa, see Madhuku (2006).

by the trade union concerned. It has been said that the system of shop stewards 'grew spontaneously and autonomously' in the British industrial relations system.¹⁰³ A shop steward, notwithstanding being a full employee of the employer, has the day-to-day function of looking after the interests of members of the trade union at the workplace, including ensuring the employer's compliance with legislation and collective bargaining agreements, dealing with individual and collective grievances and representing employees in disciplinary proceedings.¹⁰⁴ In the British system, the election and number of shop stewards at a workplace is determined by the rules or custom of the trade union concerned. In South Africa, while the election is determined by the constitution of the trade union, the number is prescribed in legislation.¹⁰⁵ The number ranges from one to twenty shop stewards, depending on the number of trade union members sought to be represented.

There are three main differences between the two systems. The first is the trade union factor. By definition, a shop steward is a trade union representative and is there to look after the interests of the members of the trade union at the workplace. A workers' committee is not a trade union institution and is there for the interests of all employees at the workplace. Even where the workers' committee is composed of trade union members only in terms of section 23(1b), it represents all employees. Secondly, the workers' committee may only operate as a committee, and so one employee alone cannot perform its functions. A shop steward is an individual and one shop steward may perform all the requisite roles at the workplace. Even where there is more than one shop steward, that does not necessarily lead to a committee. Thirdly, shop stewards are workplace level institutions. There can be a shop steward for every workplace or plant of the employer. Employees of one employer are entitled to one workers' committee even where the employer has several workplaces or plants.

The main similarity between the two systems lies in their functions. They are both designed primarily to ensure that at the workplace level, a framework is created for employees to have representation to protect their interests.

Another well-known shop floor structure is the German works coun-

103 Wedderburn (1986), p. 9.

104 Deakin & Morris (1995), p. 657.

105 Section 14(2), Labour Relations Act, 1995.

cil, which is a plant-level employee organization distinct from the trade union. It is set up by statute and its members are elected by employees at the relevant establishment. All employees at the establishment who are 18 years of age or over, and are not executives, have a right to vote for, and to stand for election as, members of the works council, whether or not they are members of a trade union. The function of the works council is to be the statutory representative body of the employees at the establishment as regards a variety of issues such as co-determination and grievances. Zimbabwe's workers' committees are substantially similar to the German works councils.

Employers' organizations

The Labour Act does not regulate trade unions only. It also regulates employers' organizations. An employers' organization is defined in section 2 as 'any association or organization formed to represent or advance the interests of any employers or groups thereof in respect of matters relating to employment.' The provisions of the Labour Act regarding registration, constitutions, interests covered, deregistration and all other issues of trade unions apply, with necessary variations (*mutatis mutandis*), to employers' organizations.

Bipartite Institutions

Works Councils

A works council is a bipartite body composed of an equal number of members representing the employer and the workers' committee. It must be established at every establishment in which a workers' committee has been elected.¹⁰⁶ The main function of the works council is to 'promote and maintain the effective participation of employees in the establishment, and to secure the mutual co-operation and trust of employees, the employer and any registered trade union representing employees in the establishment, in the interests of industrial harmony'.¹⁰⁷

The Labour Act imposes a duty on the employer to consult the works council on any proposals relating to (i) the restructuring of the workplace caused by the introduction of new technology and work methods; (ii) partial or total plant closures and mergers and transfer of ownership; (iv) product development plans, job grading and training and education

¹⁰⁶ Section 25 A.

¹⁰⁷ Section 25 A (4).

schemes affecting employees; (vi) the implementation of a code of conduct; (v) the criteria for merit increases or payment of discretionary bonuses, and (iv) the retrenchment of employees.

The consultation process is not an empty formality: the legislation requires the employer to afford the workers' committee members in the works council a 'reasonable opportunity' to advance alternative proposals, and if the employer does not agree with them, it must state reasons for disagreeing.¹⁰⁸ Further, the employer must attempt to reach consensus with the members of the works council representing the workers' committee.¹⁰⁹

Employment Councils

An employment council is a bipartite chamber which is formed by a registered trade union and a registered employers' organization in an industry. Its main purpose is to assist its members in the conclusion of a collective bargaining agreement and to supervise the implementation of that agreement. There are two types of employment councils, voluntary and statutory.

A statutory employment council is formed at the request of the Minister in terms of section 57 of the Act. The Minister may request any registered trade union and any registered employers' organization to form an employment council and apply for its registration. If the requested parties fail to form an employment council and apply for its registration, the Minister may appoint persons to represent the employers and employees concerned and such persons shall form an employment council for the industry concerned.

Statutory employment councils appear unconstitutional. They are an impermissible violation of the freedom of association, particularly the negative freedom not to associate, which is protected by section 58(2) in the following words:

No person may be compelled to belong to an association or to attend a meeting or gathering.

A voluntary employment council can only be formed by the agreement of the two parties. This means that (i) an employer can only be a member of an employment council to which its employees are members via the trade union of their choice, and (ii) a trade union can only be a

¹⁰⁸ Section 25 A (6).

¹⁰⁹ Ibid.

member of an employment council to which an employer or employers of its members are party. Any purported membership of either party to an employment council to which the other party is not a member is void by operation of law. The reason for this is clear from the scheme of the Act: employment councils are not academic institutions, they are rooted in the real life of industry and enterprises.

The registration of an employment council follows the agreement of the two parties. Once registered, an employment council becomes a separate legal person from its members.¹¹⁰ Every employment council is registered to cover a specified ‘undertaking or industry’.¹¹¹ The certificate of registration of an employment council specifies the ‘undertaking or industry’ for which it is registered. Membership status is governed by both the constitution of the employment council and the Labour Act. Withdrawal from membership by an employer who is still engaged in the ‘undertaking or industry for which the NEC is registered’ is not allowed by law. The employment council must be wound up in terms of its constitution.¹¹² Any provision in a NEC constitution purporting to give such an employer the discretion to withdraw from membership by merely giving notice is *ultra vires* the Act and therefore void. The way out for such an employer is to seek the winding up of the employment council. The reason for this position is that an employer is bound by two things, namely the industry covered by an employment council and the trade unions to which its employees belong.

If an employer is no longer involved in the business for which an employment council is registered, it also means that the employees are no longer employed in an ‘undertaking or industry’ for which the employment council is registered. Whether or not an employer is still involved in an ‘undertaking or industry’ for which an employment council is registered is a question of both fact and law. It is not a question of the mere belief of either party to an employment council. By definition, what determines an ‘industry’ is what the ‘employer and employees’ are doing in the undertakings in question.¹¹³

Given that it is a question of fact and law, if an employer believes

110 Section 60.

111 Section 59 as read with section 61.

112 Section 58(j)

113 See *United Food & Allied Workers’ Union of Zimbabwe v Crest Breeders International* HH 139/1995.

that it is no longer involved in the 'industry' for which an employment council is registered, it must raise the issue with the relevant trade union member/s of the employment council. If the relevant trade union has a different view of the matter, a dispute must be declared and taken through the framework of Part XII of the Labour Act.

Once an employment council has been formed and registered, admission of a new member is determined by its constitution.¹¹⁴ For this reason, every employment council is required to adopt a constitution which has a provision for 'the admission of new parties to the employment council'.¹¹⁵ In the case of a voluntary employment council, if its constitution grants it a discretion in the admission of new members, the courts have held that the discretion is absolute and the State cannot impose a member. In *NEC Catering Industry v Catering & Hospitality Industry Workers' Union of Zimbabwe*,¹¹⁶ the appellant was a voluntary employment council. Its constitution provided for the admission of new members in the following words:

*any... trade union registered in terms of section 36 of the Act,
in respect of persons engaged or employed in the industry,
may be admitted to membership of the council.*

The respondent trade union sought membership but its application was refused. It then approached the Registrar, who ordered that it be admitted to membership. The Labour Court endorsed this position. On a further appeal to the Supreme Court, the Registrar's order of admitting the respondent to membership was set aside; as a voluntary association, the employment council enjoyed the common law's absolute discretion as to whether or not to admit a person to membership.

It is submitted that the better view of the law as provided for in the Act is that the discretion to admit new members is not as absolute as enshrined in the common law. The discretion may be interfered with and a new member imposed if it is exercised irrationally, that is, where the decision refusing admission is so unreasonable that no reasonable person applying his or her mind to the essence of an employment council would make such a decision. The discretion may also be interfered with where the decision is illegal, such as where it is an unfair discrimination

114 Section 58(g).

115 Ibid.

116 2008 (1) ZLR 311 (S).

as contemplated by section 56 of the Constitution. Clearly, in the exceptional circumstances where a new member may be imposed, there is, *prima facie*, an infringement of freedom of association. However, such an infringement passes the proportionality test and is therefore permissible in terms of section 86 of the Constitution if (i) regard is had to the compelling need to facilitate orderly collective bargaining, and (ii) the interference with the discretion of the parties is restricted to cases of irrationality or illegality.

COLLECTIVE BARGAINING

What is collective bargaining?

The Act does not define the term ‘collective bargaining’ but defines a ‘collective bargaining agreement’ in section 2 as:

... an agreement negotiated in accordance with the provisions of this Act which regulates the terms and conditions of employment of employees.

This definition unlocks the Act’s contemplation of the process of collective bargaining as a negotiation process with a view to agreeing on terms and conditions of employment. In this respect, collective bargaining in Zimbabwe is understood in the same way as it is conceived by the ILO Convention No.154:

Collective bargaining extends to all negotiations which take place between an employer, a group of employers or one or more employers’ organizations, on the one hand, and one or more workers’ organizations on the other, for:

- (a) determining working conditions and terms of employment; and/or
- (b) regulating relations between employers and workers; and/or
- (c) regulating relations between employers or their organizations and a workers’ organization or workers’ organizations.

The key issue in collective bargaining is the drive to reach an agreement, even though it may not be reached in a given case. The South African Industrial Court had occasion to explain this distinct feature of collective bargaining in *Metal & Allied Workers' Union v Hart Ltd*¹ as follows:

There is a distinct and substantial difference between consultation and bargaining. To consult means to take counsel or seek information or advice from someone and does not imply any kind of agreement, whereas to bargain means to haggle or wrangle so as to arrive at some agreement on terms of give and take. The term 'negotiate' is akin to bargaining and means to confer with a view to a compromise or agreement.

In *TM Supermarket v TM National Workers' Committee*,² Cheda JA stated:

From what the respondent says, the appellant would not agree to award them what it had just awarded the lower grades in order to raise the minimum wages. The question perhaps is 'what is meant by negotiation?' I would take it to mean a discussion between the parties leading towards a conclusion on a certain issue. I do not consider that negotiation necessarily means a discussion in which one party gives in to the demands of the other.

The fact that the appellant refused to award what the respondent asked for suggested that the issue was discussed. The respondent seems to be of the view that, because the appellant did not agree, there was no negotiation. I do not agree. There is a difference between refusing to negotiate and refusing to grant an increase.

Not every negotiation between an employer and its employees is collective bargaining within the scope of the Act. Thus, negotiations in retrenchment matters are not collective bargaining as defined in the Act. Consequently, it has been held that the duty of disclosure in section 76 of the Act does not apply in retrenchment matters.³

1 (1985) 6 ILJ 478 (IC) at 493 H-J.

2 SC 19/2004.

3 See *Continental Fashions (Pvt) Ltd v Mupfuri & Ors* 1997 (2) ZLR 405 (S) at 408F.

Role of collective bargaining

Rycroft and Jordan have summarized three main roles that collective bargaining fulfills in labour relations.⁴ First, it fulfills an economic function, in that being premised on an acceptance of the fact that economic conflict is inherent in the relationship between management and labour, it seeks to regulate the individual and collective workplace relations. This is underscored by Davies and Freedland as follows:

By bargaining collectively with organised labour, management seeks to give effect to its legitimate expectation that the planning of production, distribution, etc. should not be frustrated through interruptions of work. By bargaining collectively with management, organised labour seeks to give effect to its legitimate expectations that wages and other conditions of work should be such as to guarantee a stable and adequate form of existence and to be compatible with the physical integrity and moral dignity of the individual and also that jobs should be reasonably secure. The principal interest of management in collective bargaining has always been the maintenance of industrial peace and the principal interest of labour has always been the creation and maintenance of certain standards- — standards of distribution of work, of rewards, and of stability of employment.⁵

Secondly, it fulfills a social function by establishing an industrial justice system which protects workers from arbitrary action by management and recognizes their right to human dignity. Thirdly, it performs a political function in that it promotes democracy in industrial life by giving employers a say in matters which affect their working lives.

Representatives of the parties in collective bargaining

On the employers' side, both a single employer and an employers' organization are competent to negotiate with a workers' committee or a trade union.

There are two types of representatives for workers in collective bargaining: a registered trade union (at industry level) and a workers' committee (at enterprise level).

4 Rycroft and Jordan (1992), pp. 116-117.

5 Davies and Friedland (1983), p. 69.

There is no separate act of recognition of a bargaining partner on the part of the employer or employers' organization. As long as a workers' committee has been properly formed and as long as a trade union is properly registered, it is, without more, entitled to represent the workers concerned

In many systems, registration of a trade union does not confer an automatic right to bargain with the employer. There must be a separate act of recognition of the trade union by the employer. In South Africa, recognition for collective bargaining purposes is itself obtained through collective bargaining and/or pressure in the form of industrial action.⁶ In other systems, the trend is for legislation to grant a right to be recognized to a registered trade union that meets a specified minimum membership threshold. Thus, section 25(1) of the Malawian Labour Relations Act, 1996 provides that:

Where at least 20 per cent of

- (a) employees of an employer at one or more workplaces; or
- (b) a particular category of employees of the employer having a significant community of interest;

are members of a particular trade union or more than one acting jointly, the employer shall recognize that trade union or those trade unions for the purpose of collective bargaining.

Section 58(1) of the Namibian Labour Act, 1992 provided that:

A registered trade union or group of registered trade unions which represents the majority of employees who fall within a bargaining unit, defined by it, and who are employed by any employer to act for a purpose of negotiating with such employer or employers organization may, upon application ... be recognised by such employer or employers' organization...as the exclusive bargaining agent on behalf of the employees...

In Swaziland, section 43(5) of the then Industrial Relations Act, 1996 provided that:

If more than 50 per cent of the employees in respect of which

6 Grogan (2010), pp. 72-73.

the industry union/staff association seeks recognition are fully paid up members of the organization concerned, the employer shall.. grant recognition to the organization.

In Britain, there are elaborate provisions for a statutory recognition procedure.⁷ The first stage is a request by an independent trade union to the employer concerned. A valid request may be presented only where an employer employs a specified minimum number of workers. If the employer refuses, the independent trade union may present an application to the Central Arbitration Committee.⁸

The position in Zimbabwe of granting the right to bargain to a trade union merely upon registration is uncommon. In general, there are three types of approaches in determining the representatives of trade unions. These are the majoritarian, pluralist and allcomers approaches.⁹ The majoritarian approach only obliges an employer to bargain with a trade union that has the support of the majority. With the pluralist approach, the employer negotiates with every trade union with a substantial representation, say of at least 20%. The allcomers approach requires the employer to bargain with every registered trade union, regardless of the level of its membership base.

In section 74(1) of the Labour Act it is provided that:

The provisions of this Part shall apply to collective bargaining agreements negotiated by registered or certified trade unions and employers or employers' organizations or federations thereof:

Provided that nothing in this Part contained shall prevent an unregistered trade union or employers' organization from negotiating a collective bargaining agreement.

Part X, which is in the Part referred to, only regulates collective bargaining agreements entered into between registered trade unions (as worker representatives) and an employer or employers' organization. The proviso says that unregistered trade unions are not prevented from representing workers in collective bargaining. The weakness of a collective bargaining process in which an unregistered trade union is involved is that since the Act does not apply to it, the statutory rights of the bar-

7 See the Trade Union and Labour Relations (Consolidation) Act, 1992.

8 Morris and Archer (2000), p. 191.

9 See Joubert (1995).

gaining parties, such as the obligation of the parties to negotiate in good faith, are not available. The agreement is binding only in terms of the common law principles of the law of contract and cannot be registered.

Workers' committees are also entitled to represent workers in collective bargaining but that process is not governed by Part X but by sections 23-25. This representation can only take place at the enterprise level and is subject to the provisions of the Act. There are three situations where collective bargaining by the workers' committee arises.

First, if there is no appropriate trade union for the employees concerned, the workers' committee will be the only lawful representative of the employees in collective bargaining and it alone can recommend or direct a strike. It is unlawful, in such a situation, for any other person to purport to represent the employees in collective bargaining.¹⁰

Secondly, where an appropriate trade union exists for the employees but has no collective bargaining agreement 'with the employer concerned', the workers' committee requires an authorization in writing by the trade union to engage in collective bargaining.¹¹ If this authorization is given, the workers' committee is entitled to engage in collective bargaining. The question which may arise is this: What is meant by the expression 'with the employer concerned'? Does it refer to the situation where the trade union has no specific agreement with the individual employer, or is it merely concerned with the situation where the trade union does not have an industry-wide agreement with the relevant employers' organization? 'There can be little doubt that what the Act has in mind is the latter, namely the absence of an industry-wide agreement which binds the employer concerned because enterprise agreements between the individual employer and a trade union for the industry do not feature prominently in the Act.'¹²

Thirdly, where a collective bargaining agreement already exists in the industry, the workers' committee shall be entitled to engage in collective bargaining 'only to the extent permitted by such collective bargaining agreement'.¹³ It is submitted that where the collective bargaining agreement is silent on the matter, the workers' committee is entitled to engage in collective bargaining to the extent that it improves on the terms and

¹⁰ Ibid.

¹¹ Section 24(3)(a).

¹² Sections 74-82 which deal mainly with industry wide agreements.

¹³ Section 24(3)(b).

conditions of employment contained in that agreement.¹⁴ In *Old Mutual v Old Mutual Workers' Committee*, the Supreme Court interpreted a clause in the collective bargaining agreement stipulating that no employee shall accept a wage amounting to less than amounts specified, as permitting collective bargaining by a workers' committee to the extent that it improved on the minimum wage.

The two parties to the collective bargaining process must, before the commencement of the negotiations, specify in writing the powers of the delegates or agents who will represent them. This is regulated by section 77 of the Act:

The parties to the negotiation of a collective bargaining agreement may be represented by committees, delegates or agents:

Provided that-

- (i) the powers of such committees, delegates or agents shall be specified in writing and certified by the parties they represent;
- (ii) copies of such documents shall be served by each party on the other party or parties prior to the commencement of negotiations.

In negotiations carried out under the auspices of an employment council, this requirement is satisfied by provisions of the constitution of the employment council concerned. Whatever the nature of the process, it is clear that the law of agency governs the extent of the powers of the delegates or agents to bind their principals.

The law is that all negotiators are agents. They bind their principals through the law of agency. Thus the whole group at the negotiating table is made up of agents: the trade union representatives are agents of the trade union (the trade union is the principal) while the employer representatives are agents of the employer or the employers' association (the employer or the employers' association is the principal). A principal is bound by the acts of its agent as long as the latter is acting within the scope of his or her authority. If the agent has no authority, the principal cannot be bound. This is trite.

Wille's *Principles of South African Law* says of an agent:

¹⁴ *Old Mutual v Old Mutual Workers' Committee* SC257/96.

An agent is a person who, by performing juristic acts for and on behalf of another person, known as his principal, places the latter in legal relations with third persons.¹⁵

There are two types of authority: actual (either express or implied) and ostensible. Both create legally binding relations. Express authority exists when a direct statement is made by the principal, either orally or in writing, indicating the authority of the agent. Implied authority may be implied either by law or from the facts of the case. It is implied from the facts where the conduct of the parties and the surrounding circumstances point to a principal-agent relationship. Gibson's *South African Mercantile and Company Law* says:

In deciding whether or not such implied agency exists, the courts will be guided by the ordinary rules as to agreements by conduct. The conduct of the parties must be such that according to the rules of common sense it admits of no other interpretation but that the parties intended the relationship of principal and agent to exist between them.¹⁶

Ostensible authority arises where there is neither express nor implied authority. With it, the principal, given its conduct of allowing the agent to act in the manner he or she did, is simply prevented from denying that the ostensible agent had authority. In some circles, it is said that the principal is 'estopped', and this is why those circles refer to it as 'agency by estoppel'.

There is also the phenomenon of ratification. If an agent acts without authority, the principal may subsequently ratify the transaction. Such ratification has the effect of clothing the act with authority. Ratification may be express or implied. Ratification will be implied if the principal so conducts himself or herself that a reasonable person would believe that he or she was in fact ratifying the act of the professed agent.¹⁷ If, with knowledge of the facts, the principal maintains silence and fails to repudiate the transaction within a reasonable time, ratification is implied¹⁸

These principles are very relevant where the collective bargaining process is complicated. If, in the course of the negotiating process, cer-

15 Van Heerden et al. (1991), p. 592.

16 Gibson (1998), p. 239.

17 *Benoni Produce & Coal Co Ltd v Gundelfinger* 1918 TPD 458.

18 *Legg & Co v Premier Tobacco Co* 1926 AD 132.

tain matters are delegated to leaders of the delegates or agents, the principal-agent relationship continues to apply. Any person familiar with collective bargaining knows that when an agreement is difficult to secure in a large group, the bargaining is moved into closed chambers of fewer representatives. This is perfectly sensible. These closed-chamber discussions are always left to the most senior representatives of the parties. The agreement in these closed chambers may bind the parties on the basis of the principles of the law of agency.

In *PTC v Zimbabwe Posts & Telecommunications Workers' Union & Ors*¹⁹ the employer sought, *inter alia*, to resile from a collective bargaining agreement on the basis that its representatives had not obtained the approval of its Board for the figures they presented during the negotiations. This argument was rejected on basic principles of the law of agency. Either the authority of the Board was, in the circumstances, not required or, if required, the Board had to be regarded as having impliedly given its approval.²⁰

A party who alleges to be labouring under a unilateral mistake in the course of negotiations is subject to the general principles of the law of contract. In terms of those principles, a contract cannot be set aside on the basis of a unilateral mistake unless the mistake is *justus* (i.e. material, reasonable and justifiable).²¹

Levels of collective bargaining

The Act does not specifically deal with the levels at which collective bargaining may take place. Two levels are clearly implied, namely the enterprise level and the industry level. At the enterprise level, an employer is free to enter into collective bargaining negotiations with the workers' committee at his enterprise, provided always that the resultant collective bargaining agreement does not provide inferior conditions to those contained in an industry-wide collective agreement. Further, if there is a trade union representing the workers concerned, the workers' committee has to be specifically authorized by the trade union. It is also a requirement that an enterprise level collective bargaining agreement entered into with a workers' committee be referred to the trade union for approval.

19 2002 (2) ZLR 722 (S).

20 At 726E-F.

21 See *University of Zimbabwe v Gudza* 1996 (1) ZLR 249 (S).

The industry level negotiation is between the trade union and the employers' organization. In most cases, this takes place under the guidance of the employment council. The Act lays more emphasis on this level of collective bargaining, hence the extensive regulation of it in Part X.

The collective bargaining practice that has developed in most enterprises in Zimbabwe is that negotiations are conducted by, and within the framework of, works councils. It is not surprising that the institutionalization, at industry level, of collective bargaining through employment councils has led to a practice where, at the shop floor, the similarly structured works councils become the avenue for enterprise level bargaining. Yet, under the Act, works councils are not necessarily collective bargaining chambers.²² In *Thomas Meikle Centre (Pvt) Ltd v TM National Workers' Committee*²³ the Supreme Court was called upon to resolve a dispute between the employer and employees over the exact scope of the role of a works council in collective bargaining. The facts were that after a collective bargaining agreement had been concluded and registered at the industry level, the employer unilaterally awarded a further 3% salary increase over and above the 22% contained in the collective bargaining agreement.

Workers objected to this unilateral increase and demanded shop floor negotiations over the additional 3% wage increase. The employer refused to negotiate and the workers referred the matter to a labour relations officer in terms of section 93 of the Act. The labour relations officer ordered the employer to enter into negotiations over the 3% salary increase. On appeal, the employer relied on the provisions of the constitution of the works council which, in section 3(1), read as follows:

The Council shall be competent to discuss and make recommendations on the following matters - (i) general working conditions of employment excluding wages and all other matters covered by the Collective Bargaining Agreement of (the) National Employment Council for Commercial Sectors of Zimbabwe.

On the basis of this provision, the employer argued that the workers' committee was bound by the works council constitution not to enter into negotiations on wages which were covered by the CBA since the

²² Section 25 A..

²³ 2002 (2) ZLR 502 (S).

works council was the only negotiating forum between the parties. The Supreme Court rejected this contention and held that the works council was a separate legal entity from both the employer and the workers' committee, even though it was created by the two entities. The workers' committee was not a member of the works council and therefore was not bound by the works council constitution. In the words of Gwaunza AJA:

*The constitution of the works council does not allow it to discuss or make recommendations on matters to do with employees' wages. That does not mean that the same limitation extends to the appellant and the first respondent. I am therefore not persuaded by the argument advanced on behalf of the appellant that the application of the constitution of the TM National works council extends beyond the council to cover entities that are independently constituted, as are the appellant and the first respondent.*²⁴

In any event, so the court reasoned, the works council constitution did not make it a negotiating forum but merely an avenue for discussing, and making recommendations on, certain issues of relevance to the parties. It was also the court's view that even if the works council constitution had empowered it to negotiate wages, that would not have been an effective basis for taking away the right, given by section 24(1) of the Act, for a workers' committee to negotiate terms and conditions of employment at the workplace outside the framework of the works council.

Duty to bargain?

Section 65(5) of the Constitution of Zimbabwe says 'every employee, employer, trade union and employee or employer's organization has the right to...engage in collective bargaining.' Does a right to engage in collective bargaining entail a duty to bargain on the other party? In other words, does the Constitution impose a judicially enforceable duty to bargain? The South African Constitution is similarly worded.²⁵ In *South African Defence Force v Minister of Defence & Ors, Minister of Defence & Ors v SA National Defence Union & Anor*²⁶ the South African Supreme Court of Appeal held that the constitutional provision does not impose a judicially enforceable duty to bargain. The constitu-

²⁴ At pp. 505G-506A.

²⁵ Section 23(5).

²⁶ (2006) 27 ILJ 2276 (SCA) (2006) 11 BLLR 1043 (SCA).

tional provision merely creates a freedom in the sense that no law may prohibit collective bargaining. When this matter went on appeal, the Constitutional Court of South Africa left the question open but hinted that interpreting the constitutional provision to mean a legally enforceable duty to bargain could draw the courts into 'a range of controversial industrial relations issues'.²⁷

International labour standards, particularly the jurisprudence of the ILO, favour voluntarism in collective bargaining matters. The better view appears to be that section 65(5)(a) of the Constitution does not create a judicially enforceable duty to bargain but requires the State to create a framework conducive to collective bargaining. That framework must necessarily ensure that a party may not unreasonably refuse to bargain. Legislation creating a duty to bargain, in certain circumstances, is therefore permissible.

Does the Labour Act create a duty to bargain? The Act does not lay down a positive duty to bargain on either side, but it is submitted that, through the concept of an 'unfair labour practice', it creates a duty to bargain on the part of the employer in certain circumstances. In terms of section 8(c), it is an unfair labour practice for an employer to refuse to bargain in good faith with a workers' committee or a trade union. Further, section 8(f) makes it an unfair labour practice for an employer to bargain collectively with an uncertified trade union where a certified trade union exists. The essence of an unfair labour practice is that the aggrieved party (in this case the workers) is entitled to get an order rectifying the unfair labour practice. The employer may be ordered to negotiate. It is not an 'unfair labour practice' for a trade union to refuse to bargain.

Because it is an 'unfair labour practice' to refuse to bargain, in all the circumstances in which a workers' committee or a trade union has a right to engage in collective bargaining, the employer is legally obliged to enter into negotiations with it unless the request by the workers' committee or trade union is grossly unreasonable.²⁸ The basis for this is simple: an improvement of the 'actual' terms and conditions of employment is a matter of interest to workers as contemplated by sections 23, 24 and 74 of the Act. In section 74 (6) it is specifically provided that:

27 See *South African National Defence Force v Minister of Defence & Anor* (2007) 9 BLLR 785 (CC), (2007) 28 ILJ 1909 (CC).

28 See *Olivine Industries (Pvt) Ltd v Olivine Workers' Committee* 2000 (2) ZLR 200 (S).

The existence of a collective bargaining agreement shall not preclude an employer and his employees from agreeing to the introduction of higher rates of pay or other more favourable conditions of employment before the expiry of such collective bargaining agreement, so however that the rights and interests of the employees are not thereby diminished or adversely affected.

This section entitles ‘employees’ to negotiate for more favourable conditions. This entitlement of employees can be exercised on their behalf by a workers’ committee or trade union representing them.²⁹

When an industry/sector level collective bargaining agreement has been concluded under the auspices of an employment council, it is common for workers at the shop floor to demand negotiations with a view to improving the wages/salaries attained by the employment council. On the other hand, it is common for employers to take the view that their legal obligations end with the industry level agreement and that they are not obliged to enter into shop floor negotiations covering the same issues resolved by the sectoral collective agreement. It is the view of most employers that as long as an employer is awarding a salary increase which is above that stipulated in the sectoral collective bargaining agreement, there is no obligation to negotiate. They find nothing objectionable in a unilateral imposition of a benefit to workers. This is precisely the approach that was taken by the employer in *Thomas Meikle Centre (Pvt) Ltd v TM National Workers’ Committee*.³⁰

The employer’s argument was summarized by the court in these words:

*It is contended for the appellant that this section does not place an obligation on the employer, that is, the appellant, to enter into negotiations with the employees, and that therefore the question of an employer negotiating or not is a dispute of interest, not an enforceable dispute of right.*³¹

With the greatest respect, the Supreme Court did not address the employer’s argument. In one portion of the judgment Gwaunza AJA said that it was not necessary to make a ruling on whether or not section 74(6) created an obligation for the parties to negotiate. In another portion her

29 Ibid.

30 2002 (2) ZLR 502 (S).

31 At 506G.

ladyship based her decision on the ground that the employer had not 'complied' with section 74(6). She also referred to a 'contravention' of section 74(6), which requires that such an increase be negotiated and agreed between the parties.³²

In yet another passage, she said:

*The appellant, it is evident, has taken the attitude that as long as it was prepared to award its employees a higher rate of pay than that specified in the Collective Bargaining Agreement, the determination of such rate was in its sole discretion, with the employees free to either take it or leave it. That is clearly contrary to the spirit of section 74(6) and is also liable to cause labour unrest. Section 74(6) seeks to minimise the possibility of tension between the employer and the employees, by emphasizing that such matters be negotiated and agreed. For one party to unilaterally decide on a rate and impose it on the other party is to make nonsense of section 74(6). The same applies to the refusal by that party, where the other party does not accept the imposition of such a rate, to negotiate.*³³

There are many elements in this passage which show that the judge considered section 74(6) as creating a legal obligation to negotiate. However, this is not specifically articulated in the judgment, and in the light of the earlier statement that it was not necessary to make a ruling on the issue, the best that can be said about Gwaunza AJA's judgment is that it is unclear on the point.

The better view of the law, however, is that section 74(6) does not create a legal obligation on either party to negotiate. It merely makes it clear that the existence of a collective bargaining agreement does not impose a legal impediment to negotiations seeking to create more favourable conditions than those stipulated in the collective bargaining agreement. It is a provision inserted by the Legislature *ex abundanti cautela* (out of abundance of caution). It creates a basis for either party to seek to negotiate. It is the 'unfair labour practice' provisions of the Act which create a legal obligation. It is sufficient to say that a refusal by the employer to negotiate leads to an unfair labour practice under section 8(c) and the

32 At 508B.

33 At 508D-E.

employer may, where the demand for negotiations is justifiable, be ordered by an arbitrator to enter into negotiations. This must have been the basis of the labour relations officer's order in the *Thomas Meikle Centre* case (*supra*). It appears not to have been based on the existence or otherwise of a legal obligation under section 74(6).

Duty to bargain in 'absolute good faith'.

Once bargaining has started, the Act creates a duty to negotiate in 'absolute good faith'.³⁴ This duty arises whether the collective bargaining exercise is voluntary or has been ordered under the 'unfair labour practice' provisions. The structure of section 75 suggests that 'absolute good faith' is not an open-ended concept and must be restricted to the aspects specified in the section. These are:

- disclosure of all information relevant to the negotiations, including information contained in records, papers, books and other documents;
- making no false or fraudulent misrepresentation in regard to matters relevant to the negotiations;
- earnestly and expeditiously endeavoring to arrive at a successful conclusion in the negotiations.

Even if it be said that the concept is not open-ended, there are certain ingredients of it which are implied. These include the duty of a party to be available for meetings at reasonable intervals, an honest intention of reaching an agreement, if possible, and the willingness to compromise.³⁵

It is an unfair labour practice to fail to negotiate in absolute good faith.³⁶

Duty of disclosure when financial incapacity is alleged

When an employer alleges financial incapacity as a ground for its inability to agree to any terms and conditions arising from the collective bargaining process, the employer is obliged to make full disclosure of its financial position, duly supported by all relevant accounting papers and other documents.³⁷ If there is a dispute as to whether or not there is full disclosure, either party may refer the dispute to a labour officer unless

34 Section 75 (2).

35 See *East Rand Gold & Uranium Co Ltd v National Union of Mineworkers* (1989) ILJ 683 (LAC).

36 Section 75 .

37 Section 76(1).

the parties agree to refer it to voluntary arbitration.³⁸

The existence of a separate provision dealing with full disclosure when financial incapacity is alleged means that the duty to disclose information as part of negotiating in 'absolute good faith' in section 75 does not necessarily require the employer to disclose its exact financial position. Disclosing the exact financial position only arises if financial incapacity is alleged as a ground for inability to agree to any terms and conditions.

Issues for collective bargaining

In terms of sub-sections (2) and (3) of section 74, it is provided:

- (2) Subject to this Act and the competence and authority of the parties, trade unions and employers or employers' organizations may negotiate collective bargaining agreements as to any conditions of employment which are of mutual interest to the parties thereto.
- (3) Without derogation from the generality of subsection (2), a collective bargaining agreement may make provision for –
 - (a) rates of remuneration and minimum wages for different grades and types of occupations;
 - (b) benefits for employees;
 - (c) deductions which an employer may make from employees' wages, including deductions for membership fees and union dues, and deductions which an employer may be required or permitted by law or by order of any competent court to make;
 - (d) methods of calculating, or factors for adjusting, rates of pay, and the dates, times and modes of payment;
 - (e) all issues pertaining to overtime, piece-work, periods of vacation and vacation pay and constraints thereon;
 - (f) the demarcation of the appropriate categories and classes of employment and their respective functions;
 - (g) the conditions of employment for apprentices;
 - (h) the number of hours of work and the times of work

38 Ibid.

- with respect of all or some of the employees;
- (i) the requirements of occupational safety;
 - (j) the maintenance of, and access by the parties to, records of employment and pay;
 - (k) procedures for dealing with disputes within an undertaking or industry;
 - (l) housing and transport facilities or, in their absence, an allowance for the same;
 - (m) measures to combat workplace violence and handling its aftermath.

Nothing can be wider. The parties can negotiate and agree on virtually anything as long as it relates to conditions of employment. The Act only lists some areas for guidance in section 74(3), but this is done ‘without derogation from the generality’ of section 74(2). However, as this is subject to the provisions of the Act, four limits are worth noting. First, parties cannot agree on terms lower than those provided for in the Act. Second, the Minister may direct the Registrar to refuse to register a collective bargaining agreement if, in his or her opinion, it is unreasonable or unfair.³⁹ Third, the parties cannot agree to avoid renewed negotiation for a period in excess of 12 months.⁴⁰ Fourth, collective bargaining on any issue does not necessarily entail a particular result, such as an increase in wages. It may end with an agreement to maintain the *status quo*.⁴¹

The wide import of section 74 was confirmed in the case of *The Catering Employers Association of Zimbabwe v The Zimbabwe Hotel & Catering Workers’ Union*.⁴² In the course of collective bargaining, the parties failed to reach agreement on three issues, namely accommodation allowance, ‘material transport’ (being actual transport for employees to and from work) and split-shifts. The employer argued that issues such as accommodation and transport fell outside the scope of collective bargaining because they are not covered by the expression ‘conditions of employment’. To the employer, ‘conditions of employment’ in section 74(2) related to those matters which are recognized by the common law

39 See below.

40 Section 74(4).

41 See generally *Chiremba & Ors v Reserve Bank of Zimbabwe* 2000 (2) ZLR 370 (S).

42 HH-206/2000.

as being closely connected to the contract of employment. On the assertion that the common law did not recognize housing and transport allowances as being directly related to the contract of employment, the employer argued that these aspects are not covered by the expression 'conditions of employment.' This argument was rejected, and Chinhengo J aptly noted:

*The common law position may be that the provision of housing and transport allowances is not related to the contract of employment. But here we are dealing with a statute which empowers the employer and employee organizations to negotiate with respect to any condition of employment as may be in the interests of one of the parties. Housing and the provision of transport are matters of interest to union members. Allowances relative thereto can only improve their position. I cannot therefore agree that the words 'conditions of employment' must be restrictively interpreted. They must, on the contrary, be given a wide interpretation to encompass any matter that may be of concern to any of the parties.*⁴³

This approach has a firm basis in legal authority. In the South African case of *Rand Tyres & Accessories (Pty) Ltd & Appel v Industrial Council for the Motor Industry Transvaal*,⁴⁴ it was stated:

There is no reason in truth, why a matter of trade policy should not be of mutual interest to employers and employees. Whatever can be fairly and reasonably regarded as calculated to promote the well-being of the trade concerned must be of mutual interest to the parties concerned, and there is no justification for restricting in any way powers which the Legislature has been at the greatest pains to frame in the widest possible language.

Deadlocks in collective bargaining

A deadlock reached in a collective bargaining process is nothing but a 'dispute' in terms of the Labour Act. It must therefore be dealt with in accordance with any of the dispute resolution mechanisms discussed in the next chapters.

⁴³ At. 4-5.

⁴⁴ 1941 TPD 108 at 115.

One of the most common ways of resolving disputes of interest arising out of collective bargaining is by reference to compulsory arbitration conducted in terms of section 98 of the Act. In *Old Mutual v Old Mutual Workers' Committee*,⁴⁵ the Supreme Court appeared to endorse the following approach whenever an arbitrator deals with a collective bargaining deadlock over wages: he or she must strike a balance between the two competing interests without bias or incompetence; must hear evidence from witnesses for both sides; must have regard to salaries granted by other employers in the industry, and must consider the cost of living.

In principle, collective bargaining disputes, being disputes of interest, must be resolved by the exercise of power by the parties. The relationship between collective bargaining and collective job action is discussed in Chapter 14.

Binding nature and scope of coverage of collective bargaining agreements

There must be a genuine agreement between the parties. The agreement must be entered into voluntarily. If, for any reason, the agreement is secured by duress, such as where a trade union uses unorthodox means to secure an agreement, the agreement is voidable at the instance of the coerced party.⁴⁶ Like any other contract, a collective bargaining agreement may be subject to a suspensive or resolutive condition. For example, in *University of Zimbabwe v University of Zimbabwe Staff Association*⁴⁷ an agreement on salaries was subject to the approval of the Ministry of Higher Education and Technology. When that approval was not given, the agreement was held unenforceable.

A collective bargaining agreement binds the parties to the agreement and the employees and employers who are members of the parties concerned.⁴⁸ As regards an industry-wide agreement, it also binds 'all employers, contractors and their respective employees in the undertaking or industry to which the agreement relates'.⁴⁹ This means that non-trade union members benefit from collective bargaining in the same way as

45 SC 257/1996.

46 *Ferguson & Partners v Zimbabwe Federation of Trade Unions & Ors* 2004(1) ZLR 475 (H).

47 SC8/2004

48 Section 82(1).

49 Section 82(1)(a).

trade union members.

A collective bargaining agreement is not automatically binding upon agreement by the parties. Two further events follow the agreement of the parties. First, it must be registered by the Registrar of Labour Relations.⁵⁰ Secondly, it must be published by the Minister as a statutory instrument.⁵¹ In section 80(2), it is stated that:

The terms and conditions of a registered collective bargaining agreement shall become effective and binding:

- (a) from the date of publication of the agreement in terms of subsection (i); or
- (b) from such other date as may be specified in the agreement.

Section 82(1)(a) is of the same effect and says:

Where a collective bargaining agreement has been registered it shall –

- (a) with effect from the date of its publication... or such other date as may be specified in the agreement, be binding on the parties to the agreement, including all the members of such parties, and all employers, contractors and their respective employees in the undertaking or industry to which the agreement relates.

The issue which arises is whether a collective bargaining agreement takes legal effect only after both registration and publication, or is registration alone sufficient to make it binding? The Supreme Court partly addressed this question in *National Railways of Zimbabwe v Gibson Siziba* representing Grade 4 and 5 NRZ Supervisory Staff.⁵² In that case, a collective bargaining agreement between NRZ employees and the employer was embodied in statutory instrument 209/95. In the 1996 wage negotiations an agreement was reached in the National Employment Council meeting of 10 and 11 July 1996 to increase salaries by 30%. The workers were not happy with the agreement and did not want it implemented. The agreement was not registered. The NRZ argued that the agreement terminated the provisions of the existing collective bargaining agreement

⁵⁰ Section 79(1).

⁵¹ Section 80(i).

⁵² SC12/2001.

contained in SI 209/95. The workers denied this and contended that SI 209/95 remained in force. The Supreme Court agreed with the workers' argument and held that the negotiations of 10 and 11 July 1996 merely produced a draft new collective bargaining agreement but this was not binding because it had neither been registered nor published as a statutory instrument. This case is not an authority for the proposition that both registration and publication are required for a collective bargaining agreement to be binding. There is a Labour Court judgment to the effect that both registration and publication are required for a collective bargaining agreement to be effective and binding.⁵³

The issue must be resolved by a proper reading of the Act. It is submitted that only registration is required for a collective bargaining agreement to be effective and binding. The publication of a collective bargaining agreement has two purposes: for public record and public access purposes and to mark the date from which the agreement becomes effective and binding, if the agreement itself does not specify a date. This position of the law is very clear. First, the relevant provisions only refer to a 'registered' collective bargaining agreement. Thus, in section 80(2), it is the 'registered' collective bargaining agreement which shall become 'effective and binding'. In section 82(1), the various issues addressed relate to a collective bargaining agreement which 'has been registered'. In both sections, the reference to 'publication' is only in relation to the 'date' of publication and not to publication *per se*. There are two relevant dates: either the 'date of publication' or 'such other date as may be specified in the agreement'. If the parties have specified a date from which the agreement shall enter into force, the date of publication is irrelevant. 'Such other date' is not restricted to a date specified in a published agreement. Secondly, when paragraphs (b) and (c) of section 82(1) are read on their own, they make it clear that a registered collective bargaining agreement is binding without publication. They provide as follows:

82(1) Where a collective bargaining agreement has been registered it shall –

(a)...

(b) remain binding despite

(i) a change of employer; or

53 Per Muchawa J in *Banc ABC v Ruwo Hamadziripi* LC/H/549/13 at p. 7, 8.

- (ii) a change of ownership of the undertaking or industry concerned; or
 - iii) a change in the membership or structure of the trade union or employer's organization;
- (c) remain binding until –
- (i) it is replaced by a substitute agreement ...; or
 - (ii) it is terminated by the mutual agreement of the parties thereto.

Thirdly, the Minister is not given any discretion whether or not to publish a registered collective bargaining agreement. He or she must publish the agreement upon its registration. On the other hand, the Minister is given enormous powers in section 79(2) to direct the Registrar not to register a collective bargaining agreement if it appears to him or her that the agreement is inconsistent with the Act or is unreasonable or unfair. If the Minister has no discretion to refuse publication, why should failure to publish a registered agreement take away the binding effect of that agreement? Clearly, the scheme of the Act is that the battle is over registration. Once registered, the collective bargaining agreement is binding and effective. If the parties have not specified a date from which the agreement becomes effective, publication is relevant to the extent that if there is no publication, the agreement does not enter into force. It would be akin to an Act of Parliament which has not yet entered into force despite being enacted by Parliament and signed by the President.

Fourthly, both registration and publication are effectively in the hands of the Minister. The Registrar may only refuse registration if directed by the Minister. If the Minister has anything against the agreement, he or she must direct the Registrar not to register it until his or her concerns have been addressed. If the Legislature had intended publication to have effect on the binding nature of the collective bargaining agreement, it would have said so, particularly by giving grounds on which the Minister may refuse publication. Surely, the Legislature could not have given the Minister two stages at which to interfere with a collective bargaining agreement?

Fifthly, there is no good reason to depart from what appears to be a general principle of the Labour Act whereby registration is the final act

in granting legal status.⁵⁴

Finally, insisting on publication, a process exclusively within the control of the Minister, as a precondition to legal validity is so grossly unreasonable as to undermine the right to collective bargaining granted by section 65(5) of the Constitution.

The collective bargaining agreement may be retrospective in operation. Where it has retrospective operation, a question which may arise is its effect on workers who have already left employment. Such former employees are entitled to be paid the difference between what they were paid and the new salaries for the period they were at work. This is what Cheda JA said in *Posts and Telecommunications v Zimbabwe Posts & Telecommunications Workers' Union & Ors*:⁵⁵

*The voluntary retirees simply want the appellant to pay them whatever was the difference between what they were paid and what they should be paid. This is because the increases were back-dated to the time when they were still in service. What it means is that those who remained in service were paid better salaries while those who left were paid less but for the same months, especially the back-dated salaries. I see no reason why they should not be paid that difference. The fact that the decision to increase the salaries and back-date them was made when they had left, or left soon after that, should not be a reason to exclude them.*⁵⁶

A problem which usually arises with the scope of coverage of a collective bargaining agreement is where an employer in one industry carries on other activities covered by another industry. In principle, an employer can be covered by more than one collective bargaining agreement, depending on the nature of the activities undertaken. Where an employer with a principal activity covered by one industry, engages in some ancillary or complementary activity which falls into a different industry, this latter activity will still be classified a part of the principal industry.⁵⁷ What

54 Codes of conduct become legally binding upon registration. Trade unions, employers' organizations and national employment councils only require registration to enjoy the benefits granted by the Act.

55 2002 (2) ZLR 722 (S).

56 At 727D.

57 See *United Food & Allied Workers' Union of Zimbabwe v Crest Breeders International* HH 139/1995.

determines whether an activity is the principal activity for the purposes of determining the industry to which an enterprise belongs is 'the primary purpose for which the employer and employees were associated in the enterprise concerned'.⁵⁸ The facts of the case of *United Food & Allied Workers' Union of Zimbabwe v Crest Breeder International*⁵⁹ illustrate the issue. In that case the employer carried on the business of 'breeding and rearing chickens' on a number of farms it owned. It also owned and operated a processing plant on one of the farms wherein chickens were 'slaughtered, cleaned and packed'. Its chicken rearing business clearly fell within the 'agricultural industry'. The issue was whether or not that component of its workers involved in the processing activities were still to be regarded as being in the agricultural industry and thus covered by the relevant regulations or were they to be placed in the meat and poultry processing industry, which had a different set of regulations. After establishing that the processing plant activities only covered a tiny portion of the employer's business, the court concluded that those activities were merely ancillary to the poultry breeding and rearing activities. Accordingly, even the workers employed in the processing activities were held to be part of the employer's main activity and thus in the agricultural industry.

Interpretation of collective bargaining agreements

There are no special rules of interpretation of collective bargaining agreements. A collective bargaining agreement is, in essence, a written contract. The general principles of interpretation of contracts and statutes apply. The golden rule is the applicable rule, namely that the agreement must reflect the intention of the parties and this is arrived at by giving words their ordinary and grammatical meaning, unless this would lead to an absurdity or repugnancy or inconsistency so glaring that it could never have been the intention of the parties.⁶⁰ The most useful guide to the interpretation of a written contract is that put forward by Joubert JA in *Coopers & Lybrand v Bryant*⁶¹ as follows:

According to the 'golden rule' of interpretation the language in the document is to be given its grammatical and ordinary

58 Ibid. p. 5.

59 HH 139/1995.

60 See *Madoda v Tanganda Tea Co.* 1999 (1) ZLR 374 (S).

61 1995 (3) SA 761 (A) at 767E-768E.

meaning, unless this would result in some absurdity or some repugnancy or inconsistency with the rest of the instrument. The mode of construction should never be to interpret the particular word or phrase in isolation (in vacuo) by itself... The correct approach to the application of the 'golden rule' of interpretation after having ascertained the literal meaning of the word or phrase in question is, broadly speaking, to have regard:

- (1) to the context, in which the word or phrase is used with its interrelation to the contract as a whole, including the nature and purpose of the contract...*
- (2) to the background circumstances which explain the genesis and purpose of the contract, that is, to matters probably present to the minds of the parties when they contracted...*
- (3) to apply extrinsic evidence regarding the surrounding circumstances when the language of the document is on the face of it ambiguous, by considering previous negotiations and correspondence between the parties, subsequent conduct of the parties showing the sense in which they acted on the document, save direct evidence of their own intentions.*

The scheme of the Labour Act is that the registered collective bargaining agreement is the exclusive memorial of the agreement between the parties. This means that the so-called 'parole evidence' rule applies. This is the rule which says that a party to a contract which has been recorded in writing cannot give extrinsic evidence of other terms of the contract to contradict, alter or vary the written contents. In *Union Government v Vianini Ferro Concrete Pipes (Pty) Ltd*,⁶² Watermeyer JA stated the rule thus:

Now this court has accepted the rule that when a contract has been reduced to writing, the writing is, in general, regarded as the exclusive memorial of the transaction and in a suit between the parties no evidence to prove its terms may be given save the document or secondary evidence of its contents, nor may the contents of such document be contradicted,

62 1941 AD 43 at 47.

altered, added to or varied by parole evidence.

The Supreme Court has had occasion to interpret a collective bargaining agreement and has applied the ‘golden rule’. This was in *Lever Brots V Bimha & Ors*.⁶³

Section 6(2) of the CBA (Detergents, Edible Oils and Fats Industry), 1997 (SI 89/1997) provides:

The ordinary hours of work for shift workers shall not exceed forty-five hours per week, or nine hours in any period of twenty-four hours.

The employees, who were shift workers, argued that the thirty-minute break from their duties which they were allowed during the night shift, should be included as part of their hours of work. If so included, it followed that they were working for a period in excess of that stipulated by section 6(2) of the agreement. They were therefore entitled to overtime payments, they argued. They succeeded in the Labour Relations Tribunal. On appeal in the Supreme Court, the employer succeeded. The Supreme Court applied the ordinary and grammatical meaning of the phrase ‘hours of work’ and said it referred to the time employees were actually engaged in work and excluded the thirty-minute break. Although the break time was spent at the workplace, it was not part of the time of productive engagement. The workers could use the time for their own purposes. The workers were therefore not entitled to overtime.

Role of the Minister and Government in collective bargaining

Governments play key roles in collective bargaining, either by encouraging or suppressing the process or even merely by tolerating it. Since 1990, the policy of the Government of Zimbabwe has been to encourage collective bargaining. First, through the Act, Government has laid the framework for collective bargaining. Second, there are specific aspects in which the Minister of Labour is given power to interfere with the freedom of the parties. The most serious invasion of this freedom is the requirement that a collective bargaining agreement be registered before it is effective and then giving the Minister discretionary power to order non-registration of the agreement. This is governed by section 79(2), which provides that the Minister may direct the Registrar to refuse registration of an agreement if it appears to him or her that the agreement

63 2004 (2) ZLR 188 (S).

is 'unreasonable or unfair, having regard to the respective rights of the parties'.

The Minister's powers are enormous. The words 'unreasonable or unfair' cannot be assigned any meaning and can therefore be assigned meanings, in practice, which are as long or as short as the Minister's arm. Further, once the Minister directs the refusal of registration, the parties now come under a duty to continue bargaining until they come up with an acceptable agreement.

Thirdly, the Minister also has power in relation to an agreement which is 'already registered'. If it appears to the Minister that the agreement has become, since registration, unreasonable or unfair he or she may direct the parties to renegotiate with a view to amending the objectionable parts.⁶⁴

While Government certainly has a legitimate interest in collective bargaining, it is questionable whether this interest should be expressed beyond merely providing a legislative framework for collective bargaining negotiations. The Minister's involvement, especially as regards refusal to register a collective bargaining agreement for reasons solely determined by himself or herself is an unreasonable interference with the freedom of the parties. The whole philosophy of collective bargaining is that the parties are the best judges of what is right for them subject, of course, to the public interest. But this public interest should not be judged by the Minister alone.

Amendment of collective bargaining agreements

There are two ways in which a collective bargaining agreement may be amended. First, the use of the expression 'any conditions of employment' in section 74(2) clearly entitles the parties to negotiate amendments to an existing collective bargaining agreement. It is an unfair labour practice for parties to refuse to negotiate in good faith or to duly participate in the fresh collective bargaining process.⁶⁵ However, once an agreement is reached and its effect is to amend an existing agreement, it will require registration before it takes effect. In fact, most collective bargaining exercises involve, in one way or another, an amendment of the existing collective bargaining agreement.

Secondly, the Minister is empowered by section 81 to require the par-

⁶⁴ Section 81(1).

⁶⁵ Section 79(3).

ties to a collective bargaining agreement to negotiate an amendment or a set of amendments. This section is primarily designed to enable the Government to intervene in the collective bargaining process and is therefore not the principal way in which a collective bargaining agreement may be amended. The principal way is through a fresh collective bargaining exercise. This was fundamentally misconstrued by the then Labour Relations Tribunal in its determination in *The Soft Drinks Manufacturing Workers' Union v Soft Drinks Employers Association*.⁶⁶ In that case, a dispute between the parties arising out of a collective bargaining exercise wherein the workers sought to amend certain parts of the existing collective bargaining agreement was referred to the Labour Relations Tribunal for compulsory arbitration. The Tribunal held that it had no jurisdiction to deal with the dispute because it involved the amendment of a collective bargaining agreement. In its view, the compulsory arbitration procedure in section 98 of the Act was not available where the dispute related to the amendment of an existing collective bargaining agreement. It said that the only procedure available for amending existing agreements was that in section 81.

Those views were nonsensical. Similar arguments were made by the employer in *The Catering Employers Association* case (*supra*) and were rejected by the High Court. Where a deadlock arises, and the matter is referred to an arbitrator, the latter must determine the matter as a dispute of interest. The arbitral award imposes an agreement which must then be registered under section 79.

If the amendment of a collective bargaining agreement is sought under section 81, care must be taken to ensure that the provisions of the section are followed, failing which any such purported amendment is a nullity. For section 81 to apply, five conditions must be satisfied. First, there must exist one of the specified grounds warranting intervention by the Minister. Only two grounds are specified. The two grounds are in section 81(1) and are that the collective bargaining agreement must contain a provision which is or has become:

- (a) inconsistent with this Act or any other enactment; or
- (c) unreasonable or unfair, having regard to the respective rights of the parties.

There used to be three grounds. The third was removed in 2005 by the
66 Judgment No. LRT/H/121/2001.

Labour Amendment Act, 2005. The ground was of being 'inequitable to consumers or to members of the public'. It was removed for being excessively vague, thereby being open to abuse.

If neither of these grounds exists, the Minister cannot intervene.⁶⁷

Secondly, the Minister must direct the parties to negotiate for the amendment/s. The mere fact that the grounds for intervention exist does not automatically empower the Minister to order an amendment. The parties must be given an opportunity to seek an agreement on any proposed amendments.⁶⁸ The Minister is empowered to specify time limits for the negotiation process.⁶⁹ He or she may also direct the parties to focus on specific aspects or proposals.⁷⁰ Thirdly, the parties must negotiate in 'absolute good faith' for the amendment and report back to the Minister.⁷¹ The parties may either agree or disagree and this must be stated in their report to the Minister.⁷² Fourthly, the Minister is only entitled to act after considering the report from the parties. He or she may amend the collective bargaining agreement in accordance with the wishes of the parties (if their report records an agreement) or in any other manner he or she considers desirable.⁷³

It is clear from the framework of section 81 that, although the Minister is not bound by the agreement of the parties on the amendments, it should be exceptional for him or her to disregard their wishes and substitute his or her own position. This arises from the fact that the section does not give the Minister automatic powers of intervention. Instead, it compels the parties to negotiate for the amendments 'in absolute good faith' and to give a report to the Minister. Surely, if after negotiating 'in absolute good faith', the parties reach an agreement on the amendments, there must be exceptional grounds for the Minister to disregard the wishes of the parties.

Fifthly, an amendment by the Minister must be registered by the Registrar for it to have legal force. To achieve this, the Minister must direct

67 See for example *Posts & Telecommunications Corp v Zimbabwe Posts and Telecommunications Workers' Union & Ors* 2002 (2) ZLR 722 (S).

68 Section 81(1).

69 Ibid.

70 Ibid.

71 Section 81(2).

72 Ibid.

73 Section 81(3).

the Registrar to register the amendment and the latter must comply.⁷⁴

The Minister's decision, whether or not to order an amendment, is subject to appeal. The appeal lies with the Labour Court and any aggrieved party is entitled to appeal.⁷⁵

The case of *Posts and Telecommunication Corp v Zimbabwe Posts & Telecommunications Workers' Union & Ors*⁷⁶ illustrates the scope of section 81. In that case the parties concluded a collective bargaining agreement which was then published as a statutory instrument. Subsequent to that publication the employer, after complying with the agreement for five months, advised the workers that it could no longer continue to pay salaries stipulated in the agreement. The reason given by the employer was that 'the salary bill has proved to be beyond its means'. The matter was referred to the Minister. The Minister did not amend the agreement. She referred the matter to an 'independent mediator' and sanctioned the payment of reduced salaries to workers while awaiting the decision of the 'independent mediator'. The workers approached the High Court, which ordered the employer to comply with the collective bargaining agreement as published in SI 26/2000. It also set aside the Minister's directive.

Two aspects make this case instructive. First, this was a proper case for section 81. The basis for inviting the intervention of the Minister would have been that some provisions of the collective bargaining agreement had become 'unreasonable or unfair, having regard to the respective rights of the parties.'⁷⁷

Secondly, the Minister's directive was set aside for failure to comply with section 81. The Supreme Court was emphatic in exposing the Minister's failure to follow the dictates of section 81. In one passage, Cheda JA had this to say:

The Minister was responding to a request to amend the agreement in SI 26 of 2000. She refused to amend it. Having so refused she sought to amend it by directing the appellant to ignore the contents of the agreement. She was wrong. She could not direct the appellant in that way unless she amended the instrument. She was supposed to act in terms of section

⁷⁴ Section 81(4).

⁷⁵ Section 81(5).

⁷⁶ 2002 (2) ZLR 722 (S).

⁷⁷ Section 81(1)(c).

*81 which she did not. Accordingly, the agreement remained intact and effective. Her directive was wrong and was properly set aside by the court a quo.*⁷⁸

In another passage the judge added:

The Minister's powers on the agreement are regulated by the Labour Relations Act. She could only exercise powers given to her by the Act. I agree with the respondent's submission that once she decided that the agreement was correct and did not need to be amended, she had no powers to refer to a mediator an agreement which was correct. What would the mediator be doing if the agreement was correct?

The Minister did not find that the agreement fell under any of the provisions of section 81 where she is empowered to amend it. It seems to me the proper opportunity to put things right was missed when the matter was referred to the Minister. Had the Minister acted in terms of the powers conferred on her by the Act, the agreement on SI 26 of 2000 could have been amended.⁷⁹

78 At 725E.

79 At 726H-727B.

DISPUTE SETTLEMENT

1. CONCILIATION AND ARBITRATION

1. Nature and classification of labour disputes

Section 2 of the Labour Act defines a 'dispute' as 'a dispute relating to any matter concerning employment which is governed by this Act'.

This definition is not very useful. While it is clear that a dispute must relate to matters concerning employment, it does not say in what circumstances it can be said that a 'dispute' exists. Does every disagreement over matters concerning employment constitute a 'dispute'? It would appear that the intention is to take the ordinary grammatical meaning of the word 'dispute' and therefore every disagreement over matters concerning employment may be a 'dispute'.

The limitation that a dispute must relate to a 'matter concerning employment' is significant. Disputes relating to social, economic and political issues of a general nature fall outside the scope of this definition. It is unclear what are the implications of the expression 'matter concerning employment'. Does this require the existence of an employment contract between the parties? It is submitted that the parties must be in an employment relationship or some other relationship which is predicated on the existence of an employment relationship. The latter would cover the relationship between an employer and a trade union: although there is no direct employment relationship between them, their relationship is predicated on the existence of an employment relationship between the employer and members of the trade union. Even a past employment relationship is covered by the definition. Thus, a dispute arising from an

employment relationship that has already been terminated is still a ‘dispute’ within the contemplation of the Act.¹

A dispute between ‘worker and worker’ appears not to be covered by this definition as there is no employment relationship between them. There is a further limitation, namely that matters of employment at the centre of the dispute must be ‘governed by this Act’. This means that a matter not governed by the Act cannot raise a dispute under the Act.

To understand more fully the scope of this definition, it is important to state the two main classifications of labour disputes. The first is of ‘individual and collective disputes’. A dispute is ‘individual’ if it ‘involves a single worker or a number of workers in their individual capacities or in relation to their individual contracts of employment’, while a dispute is collective if it involves a number of workers collectively.²

The definition of ‘dispute’ in the Act does not distinguish between ‘individual’ and ‘collective’ disputes. This means that it covers both types of dispute.

The second classification is of ‘disputes of right’ and ‘disputes of interest’. Before the Labour Relations Amendment Act, 2002, the Act did not make a distinction between these two forms of disputes. The Act now makes this distinction. In general, ‘disputes of right’, sometimes referred to as ‘legal’, refers to disputes about ‘the application or interpretation of an existing law or collective agreement (in some countries existing individual contracts of employment), whereas interest or economic disputes arise from the failure of collective bargaining, that is, when the parties’ negotiations for the conclusion, renewal, revision or extension of a collective agreement end in deadlock’.³ In a dispute of right, there is an alleged violation of an existing legal right or standard, while with a dispute of interest there is no existing legal right in contention but the parties are seeking either to establish new rights or to obtain the best bargain under the existing market and economic conditions.

The Act now defines these terms along these lines. A ‘dispute of right’

1 The position that the Act did not apply to ‘former employees’ was based on differently worded provisions and is no longer the law. For old cases on ‘former employees’, see *Blue Ribbon Foods Ltd v Dube NO & Anor* 1993 (2) ZLR 146; *Eagle Tanning (Pvt) Ltd & Anor v Employees of Eagle Tanning (Pvt) Ltd* S 238 /1991.

2 ILO (1980), p. 5.

3 Ibid.

is defined in section 2 as:

any dispute involving legal rights and obligations, including any dispute occasioned by an actual or alleged unfair labour practice, a breach or alleged breach of this Act or of any regulations made under this Act, or a breach or alleged breach of any of the terms of a collective bargaining agreement or contract of employment.

A ‘dispute of interest’ is defined as ‘any dispute other than a dispute of right’. Whenever the Act uses the word ‘dispute’, it would be referring to both types of disputes and where it wishes to refer either to a dispute of right or of interest, it would have to say so specifically. The distinction drawn between these two types of disputes means that, in general, the methods of resolution provided for in the Act depend on the nature of the dispute.

An acknowledgement of debt, even if it arises from a labour dispute, does not fall within the definition of a labour dispute. In *Ndlovu v Highlanders Football Club*⁴ the applicant entered into an employment contract with the respondent. Highlanders fell into financial difficulties and failed to pay the applicant. The total amount due to the applicant was then acknowledged by Highlanders by signing a document to that effect. When Highlanders failed to honour its commitment, the applicant took it to the High Court on the ground that the matter involved a labour dispute and had to be dealt with by the labour dispute resolution machinery in the Labour Act, not the High Court. It was held that an action based on an acknowledgment of debt was a distinct cause of action arising from the liquid document. It was not a labour dispute, despite its underlying base being a labour issue.

In *PG Industries (Zimbabwe) Ltd v Machawira*,⁵ the employee resigned from her employment. She sought to purchase the employer’s vehicle which she had been using during the course of her employment. The employer offered to sell the vehicle to her but a dispute arose between the parties as to whether a contract of sale existed between them. It was held that this was not a labour dispute, despite the issue being closely related to their previous employment relationship.

4 2011 (1) ZLR 631 (H).

5 2012 (1) ZLR 552 (H).

Prescription

In terms of section 94 of the Act, no labour officer shall entertain any dispute or unfair labour practice unless it is referred to him or her or has otherwise come to his or her attention within two years from the date when the dispute or unfair labour practice first arose. However, if a dispute or unfair labour practice is continuing at the time it is referred to or comes to the attention of the labour officer, the prescription period is irrelevant and the labour officer must entertain the dispute or unfair labour practice regardless of the length of time it has been there.⁶ Section 94(3) provides:

For the purposes of subsection (1), a dispute or unfair labour practice shall be deemed to have first arisen on the date when –

- (a) the acts or omissions forming the subject of the dispute or unfair labour practice first occurred; or
- (b) the party wishing to refer the dispute or unfair labour practice to the labour officer first became aware of the acts or omissions referred to in paragraph (a), if such party cannot reasonably be expected to have known of such acts or omissions at the date when they first occurred.

The issue of when a party ‘first became aware of the acts or omissions’ may be problematic in cases where it is the employer making the reference. The employer is usually a company and it may be difficult to say whether the knowledge of its previous board of directors may be imputed to a new board.⁷ In principle, it must be so imputed because the employer is the company not its board of directors.

Where prescription applies, the labour officer has no jurisdiction to entertain the matter.⁸

2. Methods of Dispute Resolution

The Act provides for a number of methods of dispute resolution, the most important of which are conciliation/mediation, arbitration, adjudication, collective bargaining, and engaging in collective job action.

⁶ Section 94(2).

⁷ See *Chambe v Rufaro Marketing (Pvt) Ltd & Anor* 2000 (1) ZLR 425 (H).

⁸ *City of Gweru v Josphat Munyari* SC 15/2005.

2.1 Conciliation and mediation

The old law

Before the Labour Relations Amendment Act, 2002, the Act provided for both conciliation and mediation. However, the Act did not distinguish between the two processes which, although they are often used interchangeably, are, in principle, distinct procedures. Both refer to a procedure where a third party assists parties in the course of negotiations or when negotiations have reached deadlock, to facilitate agreement on the issues in dispute. The difference between the two systems depends on the degree of participation of the third party. Thus, 'some systems of dispute settlement distinguish between conciliation as a procedure whereby the third party brings the parties together, encourages them to discuss their differences and assists them in developing their own proposed solutions, and mediation as a procedure in which a third party is more active in assisting the parties to find an acceptable solution going so far as to submit his own proposals for settlement to the parties.'⁹

It may safely be said that conciliation and mediation are processes of 'peace-making in industrial relations' and aiming to 'bring about the speedy settlement of disputes without resort to strikes or lockouts'.¹⁰

Section 93(1) provided that:

A labour relations officer, acting on his own initiative... may redress any dispute or unfair labour practice through conciliation or mediation or, if agreed by the parties, by reference to arbitration.

Thus a labour relations officer could resolve any dispute by conciliation or mediation. The officer could order the parties to submit to conciliation either after having intervened on his own accord or after a dispute had been referred. The labour officer had twelve months to resolve the dispute. There was thus very little pressure on labour officers to conciliate quickly.

The Act provided no guidelines for conciliation. In practice, the conciliation process was determined by the labour relations officer. Conciliation was not compulsory. The officer had discretion to decide whether to offer conciliation or mediation or some other competent method. A party

9 ILO (1980), p. 5.

10 Ibid.

could also request conciliation.

The Act did not say whether conciliated agreements were binding. It appears that such agreements were binding at common law. A labour officer could convert it into a determination, something similar to an order of court obtained by consent.

The current law

The Labour Relations Amendment Act, 2002 replaced all the provisions and introduced an entirely new set of provisions. These are in the current section 93 of the Act. The separate reference to ‘conciliation’ and ‘mediation’ has been done away with. The section refers to ‘conciliation’ only. Section 93(1) now provides that:

A labour officer to whom a dispute has been referred, or to whose attention it has come, shall attempt to settle it through conciliation or, if agreed by the parties, by reference to arbitration.

This reference to conciliation only is deliberate. Although conciliation is not defined in the Act, it is being used in a broad sense which covers mediation. The latter is merely one of the methods of conciliation. It is submitted that conciliation in the Act has the same scope as in the South African Labour Relations Act, 1995, where it has been defined as:

*a process by which a conciliator helps the parties to a dispute to reach a settlement. This can be done by any consensus-building process including mediation, by fact-finding or by making recommendations, including advisory arbitration...*¹¹

This means that the labour officer attempting to resolve a dispute through conciliation has a wide discretion to determine the precise method of conciliation appropriate for the dispute. He or she may use mediation or concentrate on establishing the underlying facts and making them available to the parties as a way of contributing to the resolution of the dispute. He or she may make firm proposals on how the dispute should be resolved. If the labour officer engages in anything that is not conciliation, it is a nullity.¹² The thrust of conciliation is to assist the parties to reach a settlement and this necessarily entails a wide and flexible process

¹¹ Basson et al., (2002), p. 202.

¹² *Mudzi Rural District Council v Makwembere* 2005 (2) ZLR 318 (S).

encompassing a variety of methods. Deakin and Morris define conciliation in these words:

*The process of conciliation involves assisting the parties to clarify their points of disagreement and attempting to promote a settlement but the terms of any settlement remain the responsibility of the parties.*¹³

Unlike in the old section, conciliation is now compulsory. Every dispute must be subjected to a conciliation process except where the parties agree to refer it to arbitration. The policy behind this approach is the need to expedite the resolution of labour disputes. The framers of this provision believe that conciliation is an effective method and therefore that most disputes will be resolved at this stage. This is why the only escape from compulsory conciliation is by agreeing to refer the matter to arbitration, a method which leads to a final award.

The conciliator is a labour officer, a public official employed by the Government. The Act obliges the Government to appoint 'such number of labour officers and employment officers as may be necessary for carrying out the functions assigned to such officers in terms of this Act'.¹⁴ In other developed labour relations systems, conciliation has been moved from Government officers to independent statutory bodies funded by the State. The United Kingdom and South Africa are cases in point. In 1975, the United Kingdom abandoned the system of using labour officers as conciliators and established, through the Employment Protection Act, 1975, an independent tripartite body called the Advisory, Conciliation and Arbitration Service (ACAS). Its functions include providing conciliation services through its conciliation officers. This system has been adopted by South Africa which, through the Labour Relations Act, 1995 established the Commission for Conciliation, Mediation and Arbitration (CCMA). This is also an independent tripartite body funded by the State. Its functions include providing conciliation services through the appointment of commissioners as conciliators.

There is nothing in the Labour Act to suggest that labour officers have 'territorial jurisdiction'. Section 121 does not demarcate any area of jurisdiction for labour officers. The certificate issued by the Registrar to a labour officer in terms of the Act only has to State the labour officer's

¹³ Deakin and Morris (1995), p. 92.

¹⁴ Section 12(1).

‘official title’. However, a party summoned to a conciliation may make representations relating to costs if the labour officer proposes to conduct the proceedings in an area outside the district or province of the party concerned.

Conciliation is compulsory for all disputes, whatever their nature. Thus, disputes of right and disputes of interest and individual and collective disputes all fall under the ambit of section 93(1).

The conciliation process is given a time span of 30 days from the day that the labour officer begins the process.¹⁵ The period is counted not necessarily from reference to the labour officer but from the time that the labour officer began to settle the matter. When does a labour officer ‘begin to attempt to settle a dispute’? Is it when the labour officer acknowledges receipt of the communication concerning the dispute or is it after he or she conducts the first hearing?

The wording of this section is problematic and a more definitive point of reference must be established as the 30-day period triggers the next stages.

SI 271/2003 purports to define the expression ‘attempt to settle’ by prescribing three situations, namely:

- (a) any form of communication;
- (b) any form of notification for parties to attend proceedings;
- (c) any hearing the Labour Officer may conduct.

This means that whichever is the earlier is taken into account. It would appear that the provisions in SI 217/2003 may be *ultra vires* the Act in that the Minister has arrogated to himself or herself the power to interpret the Act. This is contrary to the principle of separation of powers and may be invalid. It is also doubtful whether section 17 of the Act permits this law-making function. The situation would have been different had the Act authorized interpretation of its provisions by the Minister.

The 30-day provision does not mean that a labour officer must do his or her work less than expeditiously. Where the nature of the dispute or its surrounding circumstances are such that less time is required, any delay even within the 30-day period may be subject to judicial review. The test is one of reasonableness.

If the dispute is settled by conciliation, the labour officer is required

¹⁵ Section 93(3).

to record the settlement in writing. In terms of the relevant regulations the labour officer must record the settlement in a prescribed form entitled 'Certificate of Settlement' (LR1) and append his or her signature. The parties must also append their signatures as confirmation.¹⁶ If the dispute is not resolved within the said 30-day period, then, unless the parties agree to extend the period for conciliation,¹⁷ the process must come to an end and the labour officer is obliged to issue 'a certificate of no settlement'.¹⁸ In terms of the regulations, this certificate, Form LR2, must be signed by the officer concerned.¹⁹ The issue of a certificate of no settlement enables the parties to invoke other labour dispute resolution mechanisms.

A *mandamus* may be granted requiring a labour officer to act as required by the Act.²⁰ Proceedings before a labour officer must be flexible and there is no hard-and-fast rule as to which party must begin during conciliation proceedings. It must be at the discretion of the labour officer.²¹

The reference of a dispute to a labour officer for conciliation does not take away the employer's right to institute disciplinary proceedings against the employee if there is an allegation of misconduct.²²

2.2 Arbitration

Arbitration is 'a procedure whereby a third party (individual arbitrator, board of arbitrators or arbitration court), not acting as a court of law, is empowered to take a decision which disposes of the dispute.' It 'usually involves a contested hearing at which the parties present evidence and argument to a third party, followed by that arbitrator's decision or award, which is usually binding on the parties.'²³ To understand the current provisions on arbitration, it is essential to revisit the old law before the enactment of Act No.17 of 2002.

The old law

The then Labour Relations Act provided for both voluntary arbitration

16 Section 2, Labour (Settlement of Disputes) Regulations, 2003.

17 Section 93(4).

18 Section 93(3).

19 Section 3 of SI 217/2003.

20 *Oil Blending Enterprises (Pvt) Ltd v Minister of Labour* 2001 (2) ZLR 446 (H).

21 See generally *Mashonganyika v Lena NO & Anor* 2001 (1) ZLR 103 (H).

22 *Augustine Tirivangani v University of Zimbabwe* SC 21/2013.

23 ILO (1980), p. 6.

and compulsory arbitration. Voluntary arbitration was provided for in terms of section 93(1)(a). Parties could, on their own or at the suggestion of a labour relations officer, request that the dispute be referred to arbitration. It could also arise from a collective bargaining agreement.

Compulsory arbitration was a special process arising in three main ways. First, in terms of section 98(1), a labour officer could refer a dispute to compulsory arbitration where the dispute was likely to lead to industrial action if it was not resolved and he considered compulsory arbitration appropriate. Secondly, the Minister could, in terms of section 93(i)(d)(i), order a collective dispute between one or more trade unions or employers' organizations to be referred to compulsory arbitration. Thirdly, if the parties to a dispute included a trade union or employers' organization, the parties could request that the matter be referred to arbitration in terms of section 93(i)(d)(i).

As soon as a matter had been referred to arbitration, the Act prohibited collective job action, and it was an offence to recommend or incite collective job action.

Arbitration was conducted by the Labour Relations Tribunal, established in terms of section 99 of the Act. It was clearly established that disputes of interest arising out of the collective bargaining process, such as deadlocks over wages, were arbitrable and could be the subject of compulsory arbitration under section 98. Although this point should have been regarded as obvious from the definition of 'dispute' in section 2 of the Act and from the Supreme Court case of *Old Mutual v Old Mutual Workers' Committee*,²⁴ it was challenged in the High Court case of *Catering Employers Association of Zimbabwe v The Zimbabwe Hotel and Catering Workers' Union*.²⁵ It was argued, on behalf of the employers, that the Tribunal had no jurisdiction to deal with disputes of interests because that involved the Tribunal in *creating* rights and/or obligations which the parties did not have before approaching it. In other words, section 98 only contemplated reference of disputes to compulsory arbitration. This argument was rightly rejected because the Act was clear that disputes of interest could be resolved by compulsory arbitration, with the Labour Relations Tribunal as the arbitrator.²⁶ Further, the Supreme Court had confirmed that position in the *Old Mutual* case (*supra*) where arbitration

24 SC 251/1996.

25 HH 206/2000.

26 Section 98 as read with section 100.

has been invoked by order of a labour relations officer, with the Minister being obliged to refer it to the Labour Relations Tribunal within 14 days of receiving the order of the labour relations' officer.

An issue which had arisen with the compulsory arbitration process under the then Labour Relations Act was whether or not it was subject to the provisions of the Arbitration Act.²⁷ Section 5 of the Arbitration Act provides as follows:

- (1) Subject to subsection (2), where an enactment requires any matter to be determined by an arbitrator or by arbitration in accordance with any law relating to arbitration, such requirement shall be deemed to be an arbitration agreement for purposes of this Act.
- (2) Where an enactment provides for the determination of any matter by arbitration, the provisions of that enactment, to the extent that they are inconsistent with this Act, shall prevail.

In the *Catering Employers Association of Zimbabwe v Zimbabwe Hotel & Catering Workers' Union*,²⁸ it was held that by virtue of the above provisions, compulsory arbitration in terms of the Labour Relations Act was governed by the Arbitration Act. This legal position raised an issue of immense practical significance. Under the then Labour Relations Act, a decision of the Tribunal could only be appealed against on matters of law to the Supreme Court.²⁹ Under the Arbitration Act, an arbitral award can only be set aside on the grounds specified in Article 34 of the Model Law. The question was: what course of action was available to a party who was dissatisfied with a decision of the Tribunal in compulsory arbitration? A close reading of the *Catering Employers Association* judgment shows that Chinhengo J took the view that such a party had four choices: it could appeal to the Supreme Court in terms of section 92(2) of the then Labour Relations Act, or approach the High Court under Article 34 of the Model Law, or seek review in the High Court under section 27 of the High Court Act or common law, or combine review under the High Court Act and that under the Arbitration Act. Needless to say, these courses of action could, on the same facts, lead to different results. It was difficult to find a reason for the Legislature to have intended such a complex sce-

²⁷ Act 6 of 1996.

²⁸ HH 206/2000.

²⁹ Section 92.

nario. It is submitted that this must have been a wrong reading of the statutes in question. Even assuming that the Arbitration Act applied, section 5(2) of that Act specifically provides that if there was any inconsistency between an enactment providing for arbitration and the Act itself, the enactment in question prevailed. This meant that the provisions of the Labour Relations Act relating to dissatisfaction with a Tribunal decision prevailed over those of the Arbitration Act.

On appeal, the Supreme Court authoritatively rejected this approach and held that an arbitration award, including under the Labour Act, could only be set aside in terms of Article 34(2) of the Model Law. Sandura JA shot down Chinhengo's approach in the following emphatic way:

The suggestion by the learned judge is that, in addition to the grounds set out in Article 34(2) of the Model Law, an arbitral award may be set aside by the High Court on review on the grounds set out in section 27 of the High Court Act [Chapter 7:06]. The Model Law sets out the sole grounds on which an arbitral award may be set aside by the High Court.³⁰

In the old law, the Supreme Court also explained the manner of exercise of the powers of the arbitrator in disputes of interest. The following passage in Muchechetere JA's judgment in the *Old Mutual* case (*supra*) is worth reproducing:

The Tribunal attempted to balance the two competing interests without bias or incompetence in the proper spirit of arbitration. It heard evidence from witnesses for both sides and had figures regarding salaries granted or to be granted by other insurance companies. It found that there had been a rise in the cost of living, that the previous salaries had been agreed, that it would be unfair to reverse what had been agreed upon in the past, and that in order to keep pace with the cost of living the workers deserved 'hefty' increases. The determination which was very near the region where both parties were inching towards, was made on a full consideration of the interests of both parties. There is nothing wrong or unreasonable in such an approach. And the Tribunal was not guilty of any error of law in its factual determination.

30 See *Catering Employers Association of Zimbabwe v Zimbabwe Hotel & Catering Workers' Union and Anor* 2001 (2) ZLR 388 (S).

This passage showed that in exercising its jurisdiction as an arbitrator, the Tribunal was bound by the general principles of arbitration. For instance, the Tribunal could not decide on an issue not referred to it by the parties. In the *Catering Employers Association* case (*supra*), the High Court set aside part of the award of the Tribunal where the Tribunal had awarded a transport allowance when the dispute referred to it concerned 'material transport'. Although this aspect of the judgment was based on applying Article 34 of the Model Law the same result could have been arrived at on the application of general principles of arbitration.

Current law

The current provisions still provide scope for two forms of arbitration: voluntary arbitration and compulsory arbitration. Voluntary arbitration is not regulated by the Act. The Act is concerned exclusively with what it terms 'compulsory arbitration'. Voluntary arbitration arises under section 93(1) where parties may agree to forego conciliation and opt for voluntary arbitration. It may be suggested that the expression 'reference to arbitration' in section 93(1) means 'reference to compulsory arbitration'. This is incorrect for two reasons. Firstly, whenever the Act wants to refer to compulsory arbitration, it says so explicitly.³¹ Secondly, the scheme of the Act is that compulsory arbitration is not competent before compulsory conciliation. Only voluntary arbitration is permitted to side-step compulsory conciliation. Voluntary arbitration of a labour dispute is governed by the Arbitration Act and is therefore no different from the arbitration of disputes in other spheres of life.

Compulsory arbitration

The current provisions substantially alter the previous law on compulsory arbitration. Compulsory arbitration only arises after the failure of conciliation and the issuing of a certificate of no settlement. Its mere existence as an option may encourage parties to co-operate with the conciliation process. However, it is not the automatic dispute resolution method available whenever conciliation has failed. It is the automatic method in only one situation: for a dispute of interest in an essential service. In this situation, the labour officer, after issuing a certificate of no settlement, must refer the dispute to compulsory arbitration. In respect of disputes of interest outside an essential service, compulsory arbitra-

31 See for example section 93(5).

tion is only available if the parties agree.³² In other words, the labour officer may only refer a dispute of interest outside an essential service to compulsory arbitration if the parties agree.

In respect of any form of dispute of right, whether in or outside an essential service, there are two routes to compulsory arbitration. The labour officer either secures the agreement of the parties to refer the dispute to compulsory arbitration under section 93(5)(b) or exercises his or her discretion to refer the dispute to compulsory arbitration under section 93(5)(c), whether or not the parties agree.

This new scheme focuses on the nature of the dispute in determining whether or not to refer it to compulsory arbitration. Disputes of interest depend on whether or not an essential service is involved. If an essential service is involved, the dispute must be referred to compulsory arbitration. A dispute of interest outside an essential service cannot be referred to compulsory arbitration in the absence of an agreement by the parties. Disputes of right may be referred to compulsory arbitration in two situations: either with the agreement of the parties or at the discretion of the labour officer.

The effect of reference of a dispute to compulsory arbitration is that no collective job action in respect of the dispute may be engaged in.³³ It is a criminal offence, punishable by imprisonment, for any party to engage in collective job action after the dispute has been referred to compulsory arbitration.³⁴

Where a dispute has not been referred to compulsory arbitration, the position depends on the nature of the dispute and is as follows: (i) For a dispute of interest outside an essential service, any party to the dispute may apply to the Labour Court³⁵ for an order to remit the dispute to the same or a different labour officer ‘with instructions directing that officer to attempt to resolve it in accordance with such guidelines as it may specify’.³⁶ Alternatively, any party may invoke collective job action in accordance with the provisions of the Act. (ii) For a dispute of right, any party to the dispute may apply to the Labour Court for adjudication.³⁷

32 Section 93(5)(b).

33 Section 98(11).

34 Section 98(12).

35 Section 93(7).

36 Section 89(2)(b).

37 Section 93(7) as read with section 89(2)(c).

Before a dispute is referred to compulsory arbitration, the parties are entitled to be afforded a reasonable opportunity of making representations.³⁸ With disputes of interest in-essential services, the representations can only relate to the terms of reference of the arbitrator, as the Act already compels reference to compulsory arbitration in such disputes. In disputes of right, the representations may address two aspects, namely

- (i) the desirability or otherwise of referring the dispute to compulsory arbitration, and
- (ii) the terms of reference of the arbitrator, should reference to compulsory arbitration be ordered. In the final result, the terms of reference of the arbitrator are determined by the labour officer or Labour Court, as the case may be.³⁹

The arbitrator is appointed from a list of arbitrators prepared by the Minister of Labour.⁴⁰

The Act empowers the Minister to appoint arbitrators and keep a list of them. The Minister is required to do so in consultation with the Judge President of the Labour Court and any appropriate advisory council appointed in terms of section 19 of the Act.⁴¹ The Minister must appoint the arbitrators from the following two groups: (a) any labour officer or designated agent whom the Minister considers to be experienced or qualified in arbitration, and (b) any other person whom he considers to be experienced or qualified in arbitration.⁴² The Minister is required to keep a list of the arbitrators in the two groups. No person may be appointed as an arbitrator in a compulsory arbitration process unless his or her name is on the list of arbitrators prepared by the Minister under section 98(6). Ministerial appointment is therefore a precondition to acting as an arbitrator under section 98. The Minister's powers in the selection of persons to join the list of arbitrators are largely uncontrolled.

Once an arbitrator has been appointed, the arbitration process is governed by the Arbitration Act in terms of section 98(2) which provides that:

38 Section 98(3).

39 Section 98(4).

40 Section 98(5).

41 Section 98(6).

42 Ibid.

subject to this section, the Arbitration Act (Chap 7:15) shall apply to a dispute referred to compulsory arbitration.

The main effect of this provision is that any matter not covered by section 98 of the Labour Act is regulated by the Arbitration Act. For example, given that section 98 covers the appointment of the arbitrator, the provisions in the Arbitration Act dealing with the appointment of arbitrators do not apply in compulsory arbitration.⁴³ On the other hand, the conduct of the hearing and the making of an award are matters not provided for in section 98 and are therefore covered by the Arbitration Act. Thus, in general, the parties are free to agree on the procedure to be followed, failing which the arbitrator may conduct the proceedings in such manner as he or she considers appropriate.⁴⁴ Parties are also free to agree on the place of the arbitration, failing which it shall be determined by the arbitrator 'having regard to the circumstances of the case, including the convenience of the parties.'⁴⁵

Challenging the arbitrator

Section 98 does not provide for challenges to an arbitrator on the grounds of either justifiable grounds as to his impartiality or independence or his or her not being qualified. By virtue of section 98(2), such a challenge is governed by articles 12 and 13 of the Model Law and must be made to the High Court. The Labour Court has no jurisdiction to deal with the challenge. In terms of article 13, the challenge must be made within fifteen days after becoming aware of any circumstances justifying a challenge in terms of article 12. The challenge is determined by the arbitrator, and if it is dismissed the arbitration must proceed, but the challenger may request the High Court, within thirty days after receiving the rejection, to decide on the challenge. In evaluating bias or impartiality, the test to be applied is an objective one: it is not an enquiry into the mind of the arbitrator to determine whether or not he or she was or would be actually biased. The enquiry is: is it reasonable to suspect a real likelihood of bias?⁴⁶ The arbitrator is bound to deal with the challenge: he or she cannot ignore the

43 *Samudzimu v Dairiboard Holdings* 2010 (2) ZLR 357(H).

44 See Article 19 of the Model Law.

45 See Article 20 of the Model Law.

46 See *Leopard Rock Hotel Co (Pvt) Ltd & Anor v Walenn Construction (Pvt) Ltd* 1994 (1) ZLR 255 (S) at 275A; *Standard Chartered Finance Zimbabwe Ltd v Georgias & Anor* 1998 (2) ZLR 547 (H) at 549-50; *EBI Zimbabwe (Pvt) Ltd v Old Mutual Unit Trusts (Pvt) Ltd & Anor* 2009 (1) ZLR 356 (H).

challenge and proceed with arbitral proceedings as if his or her appointment has not been challenged.⁴⁷

If, after an award has been made, a party discovers that the arbitrator was disqualified by reason of his or her failure to disclose any circumstances that were likely to give rise to justifiable doubt as to his or her impartiality, the aggrieved party may only proceed by way of review in the Labour Court or High Court and will have to establish that the arbitrator was actually biased.⁴⁸

Appeal against arbitral award

Is the arbitration award final? This is a matter over which there is a difference between the Arbitration Act and section 98 of the Labour Act. Under the Arbitration Act, an arbitration award is final and can only be set aside on application to the High Court on very restricted grounds specified in article 34 of the Model Law. Under section 98, an arbitration award may be appealed against to the Labour Court 'on a question of law'.⁴⁹ The concept of a 'question of law' also applies to appeals from the Labour Court to the Supreme Court and is therefore discussed in the next chapter.⁵⁰

Given the provisions of section 98(2), the Arbitration Act does not apply in respect of the finality or otherwise of arbitral awards. What applies is section 98(10) which allows appeals 'on a question of law'. This means that an arbitral award issued in a compulsory arbitration proceeding is final over matters of fact but may be challenged in the Labour Court on a 'question of law'. Article 34 of the Model Law does not arise. It does not apply. This aspect has been settled by the Supreme Court.⁵¹

In the *NetOne Cellular* case (*supra*), an attempt was made to argue that the Supreme Court had no jurisdiction to hear an appeal from the Labour Court where the origin of the judgment being appealed against was an arbitral award. It was part of the reasoning underlying this argument that a Labour Court judgment settling an appeal under section 98(10)

47 *Trust Corp Securities (Pvt) Ltd v Gabilo & Anor* 2009 (1) ZLR 343 (H).

48 *Compare Musonza (Pvt) Ltd v Standard Fire & General Insurance Co (Pvt) Ltd & Anor* 2002(1) ZLR 535 (H).

49 Section 98(10).

50 See under 'Supreme Court' in Chapter 13.

51 See *NetOne Cellular (Pvt) Ltd v Communication & Allied Services Workers' Union of Zimbabwe and Fifty-six NetOne Employees* SC 89/2005 at p. 5.

against an arbitrator's award was itself an arbitration award. Accordingly, a litigant seeking to set aside such a judgment had to do so in terms of Article 34 of the Model Law and therefore had to approach the High Court. This argument was rightly rejected because it ignored the clear wording of section 92D. As Chidyausiku CJ observed:

*Once a matter has been heard by the Labour Court, an appeal lies to this court in terms of s92D of the Act. The origins of the judgment being appealed against is irrelevant.*⁵²

In *Mbisva v Rainbow Tourism Group Ltd*,⁵³ it was argued that the Labour Court, when considering an appeal or a question of law from an arbitral award, could only set aside the award on the basis of the grounds in Article 34, which included that 'the award is in conflict with the public policy of Zimbabwe'. This argument was rejected. The Supreme Court held that the Labour Court was not governed by Article 34. Sandura JA said:

*In my view, it is quite clear, from a careful reading of Article 34, that the Article only deals with and limits the power of the High Court to set aside an arbitral award, and does not in any way deal with or limit the power of the Labour Court to set aside an arbitral award challenged in terms of section 98(10) of the Act. I cannot therefore see any reason for departing from this court's decision in the Net*One case supra.*

*Consequently, the Labour Court did not have to be satisfied that the arbitral award was in conflict with the public policy of Zimbabwe before setting it aside.*⁵⁴

What this means is that the Labour Court is not required to refer to the grounds in Article 34, but some of those grounds may qualify as 'questions of law' for the purposes of section 98(10) of the Labour Act.

Enforcement of arbitral awards

Once an arbitration award has been made, the arbitrator is required to

⁵² At p. 6.

⁵³ 2009 (2) ZLR 33 (S).

⁵⁴ At p. 39C-D.

submit sufficient certified copies to each of the parties.⁵⁵ To enforce the award, the party to whom it relates must submit it for registration by the magistrates' court or High Court, depending on the quantum of the award.⁵⁶ In *Mandiringa & Ors v National Social Security Authority*,⁵⁷ Makarau J held that for an award to qualify for registration under section 98(14), it must sound in money either in the main or in the alternative. Accordingly, she refused to register six different awards, in each of which the arbitrator had ordered reinstatement but without specifying an amount of damages to be paid in lieu of reinstatement.

The judge based her conclusion on three grounds. First, she reasoned that since the magistrates' court has not the same inherent jurisdiction as the High Court but is, instead, a creature of statute with its jurisdiction as expressly conferred by the Magistrates' Court Act,⁵⁸ it would not be possible to determine whether or not an award exceeds the jurisdiction of the magistrates' court if it is not sounding in money. This is so, according to the judge, because the jurisdiction of the magistrates' court is 'limited... generally to claims not exceeding an amount to be prescribed in the rules of the court'. In other words, without the specification of an amount, the jurisdiction of the magistrates' court cannot be determined. Secondly, a determination as to which of the two courts has jurisdiction can only be made when an award sounds in money. Thirdly, she found support in section 89(2)(c)(iii) which directs that any order of reinstatement by the Labour Court 'shall specify an amount of damages to be awarded to the employee concerned as an alternative to his reinstatement or employment'. She interpreted this requirement as follows:

It is, therefore, the settled position of our law that, in ordering reinstatement in terms of the Labour Act, the Labour Court, labour officers and arbitrators appointed under the Act are duty bound to assess damages in lieu of reinstatement. Any judgment, determination or award by these officials that fails to do so is liable to be interfered with as a misdirection or as failing to comply with the Act in a material way. An award that orders the reinstatement of the applicant without award-

⁵⁵ Section 98(13).

⁵⁶ Section 98(14).

⁵⁷ 2005 (2) ZLR 329 (H).

⁵⁸ Chap 7:10.

ing a specified amount in damages in lieu of the reinstatement is incomplete and consequently incompetent and cannot be registered in terms of section 98(14).⁵⁹

In *C. Muchenje and Ors v Stuttafords Removals (Pvt) Ltd*,⁶⁰ Tsanga J rejected an objection to registration which sought to separate the quantification of the award from the award itself. In that case, the arbitrator had made an award in the following terms:

That each of the sixteen employees be paid, as damages, an amount equivalent to six months salary and benefits.

When the employer refused to pay, the employees ‘applied’ to the arbitrator for quantification of the ‘six months salary and benefits’. The quantification was evidenced by a separate document signed by the arbitrator. The employer argued that this separate document was a separate award which was invalid for non-compliance with the requirements of the form and content of an arbitral award in terms of Article 31 of the Model Law. Tsanga J rightly rejected this argument, holding that the two (main award and supplementary document) were indivisible. It was one award which complied with the form and content stipulated in Article 31.

The award need not be in strict compliance in terms of its form. The courts may condone lack of strict compliance with the form if there is substantial compliance and there is no discernible prejudice to the other party.⁶¹

In *Senele Dhlomo-Bhala v Lowveld Rhino Trust*,⁶² the respondent objected to registration, inter alia, on the basis that the applicant had not submitted the original arbitration agreement, in addition to a duly authenticated original copy of the award. This was purportedly based on Article 35 of the Model Law. This objection was rejected, the court holding that Article 35 did not apply and the Labour Act did not require it.

There are two scenarios with arbitral awards on quantification. One is where the first award orders the parties to agree on damages in lieu of reinstatement, failing which they revert to the arbitral tribunal for quan-

⁵⁹ At p. 333 G-H.

⁶⁰ HH 374/2013.

⁶¹ See *Senele Dhlomo-Bhala v Lowveld Rhino Trust* HH263/2013 where an uncertified copy of the award was accepted for registration.

⁶² *Supra*.

tification. The second is where the first award grants damages in the format of ‘six months salary’ and the parties fail to agree on the quantum of ‘six months salary’. In this second scenario, the second award that puts a figure on ‘six months salary’ is, in principle, not a separate award.⁶³ In the first scenario, the second award is indeed a separate award which must comply with all the requirements of the law regarding its making and form.⁶⁴

Section 98(14) only provides for registration. There is no other relief available beyond registration. Accordingly, it is not competent for an application for registration to seek other relief, such as an order for the attachment and execution of property in the event of non-payment.⁶⁵

Several issues arise from the registration of arbitral awards. Each is discussed in turn.

Procedure for registration

Both the magistrates’ court and the High Court are subject to rules of court that govern procedural matters. The process of registration must be in terms of the rules of court. There are always two procedures for an application: a court application and a chamber application. The Legislature did not specify any preferred procedure in section 98(14). In principle, a chamber application, with notice to the other party, appears more consistent with the legislative intention of using these two courts for execution purposes only. In *Senele Dhlomo-Bhala v Lowveld Rhino Trust*,⁶⁶ Mafusire J rightly rejected a contention by the employer to the effect that an application for registration of an arbitral award had to be a ‘court application’ and not a ‘chamber application’. The employer had argued that ‘High Court’ in section 98(14) meant an open court and not a judge sitting in chambers. The employer’s argument had no foundation whatsoever. For the High Court, both applications (‘court and chamber’) are determined by one judge. This is unlike the Supreme Court, where every appeal must be heard and determined by at least three judges. In the Supreme Court, it is perfectly sensible to distinguish between a chamber application, determined by one judge, and an appeal in open

63 See *Muchenje v Stuttafords (Pvt) Ltd* HH 373/2013..

64 See *Gaylord Baudi v Kenmark Builders (Pvt) Ltd* HH 4/2012.

65 *Kingdom Bank Workers’ Committee v Kingdom Bank Financial Holdings* 2012 (1) ZLR 93 (H).

66 HH 263/2013.

court, determined by three judges. Thus the employer's argument in respect of the High Court lacked any sound jurisprudential basis and was rightly dismissed. The law is therefore that a chamber application is competent for the registration of an arbitral award.

Does the court have jurisdiction to refuse registration?

In *Elvis Ndlovu v Higher Learning Centre*,⁶⁷ the employer opposed the registration of an award on the basis that it was not afforded an opportunity to be heard before the award was made. It also argued that the arbitrator had not complied with section 98(13). Mathonsi J dismissed the objections and said:

None of the reasons for opposing the application for registration are sustainable. It is common cause that there is an arbitral award in existence which award was made in terms of the law. That award has not been set aside and, indeed nothing had been done by the respondent to challenge that award as it is entitled to do by the Labour Act. It is common cause that there is nothing pending in any court putting to question that award.

*Respondent cannot seek to challenge an arbitral award in opposing papers filed in an application for registration. In an application of this nature this court does not inquire into the merits or otherwise of an arbitral award. That is the province of the Labour Court upon an application or appeal being made to that court. Registration of an arbitral award is only done for purposes of enforcement because the labour structures have no enforcement mechanism.*⁶⁸

An equally admirable approach is that of Bhunu J in *Mvududu v Agricultural & Rural Development Authority*:⁶⁹ The learned judge said:

The first issue is whether the applicant is automatically, as a matter of right, entitled to register an award upon satisfying the conditions specified in section 98(14) of the Act. In order to qualify for registration all that an applicant has to do is to satisfy the court that:

67 HB 86/2010.

68 At p. 2.

69 2011 (2) ZLR 440 (H).

- (a) he is a party to the arbitral proceedings; and*
- (b) the award relates to him; and*
- (c) the copy he is presenting for registration has been duly certified by the arbitrator in terms of subsection (13).*

*Once the applicant has satisfied the above three requirements, he is entitled as of right to register the arbitral award in terms of section 98(14) as read with subsection (13). Any opposition to registration is therefore limited to showing that the applicant has not satisfied any one or more of the three prescribed requirements for registration.*⁷⁰

It is now well established that this is the approach of the High Court to the registration of an arbitral award.⁷¹

This is a correct approach. The court may not inquire into the merits or demerits of the award. It is not entitled to entertain any challenge which amounts to either a review of, or an appeal against, the award. The Legislature did not create the registration regime in section 98(14) in order to provide an alternative avenue to the of an challenge the arbitral award. Registration may only be refused in exceptional circumstances where it would amount to a manifest abuse of the court. There is no closed list of such exceptional circumstances but the following belong to the list: (i) a patent error (such as a miscalculation of figures or wrong names of the parties), (ii) an award obtained by fraud, (iii) an award which is not an award because of non-compliance with the terms and content stipulated in Article 31 of the Model Law, and (iv) an abnormally huge quantum of damages which induces a sense of shock.

Registration cannot be refused on the general ground of being contrary to public policy, because to decline registration on that ground would be to permit a disguised setting aside of the arbitral award.⁷² The act of registration is the exclusive preserve of the magistrate or judge of the High Court. No court official such as the clerk of court or Registrar of the

⁷⁰ At pp. 451-452A.

⁷¹ See also *C. Muchenje & Ors v Stuttafords (Pvt) Ltd* (*supra*); *Senele Dhlo-mo-Bhala v Lowveld Rhino Trust* (*supra*); *Muronzerei v Petrol Trade (Pvt) Ltd* HH 95/2014..

⁷² See *Samudzimu v Dairibord Holdings Ltd* 2010 (2) ZLR 357(H).

High Court has the power to register an arbitral award.⁷³

The position of Patel J (as he then was) in *Gaylord Baudi v Kenmark Builders (Pvt) Ltd*⁷⁴ that the grounds for refusing registration under section 98(14) are the same as those specified in article 36 of the Model Law which are applicable to other awards is plainly wrong. Article 36 of the Model Law does not apply to the registration scheme in section 98(4). This is by virtue of section 98(2). Section 98(14) is adequately specific and does not require reference to the Arbitration Act. More fundamentally, Patel J's approach invites the general ground of public policy, a ground clearly not contemplated by the framers of section 98(14). In the *Gaylord Baudi* case itself, Patel J had difficulties dismissing the public policy argument against registration. These difficulties are simply avoided by not invoking Article 36. Patel J was inclined to this view again in *Kingdom Bank Workers' Committee v Kingdom Bank Financial Holdings*⁷⁵ but this was with the agreement of both legal practitioners for the parties. In *Husaihwevhu & Ors v UZ-USF Collaborative Research Programme*⁷⁶ Gowora J appeared to accept, *obiter*, that the public policy defence was available to a respondent seeking to oppose registration. She said:

*If indeed the registration of the award would be contrary to the public policy of this country and there is clear evidence on the record, I would venture to say, with respect, that the court would have to consider the defence and afford the respondent the protection under the Arbitration Act.*⁷⁷

The better view of the law on the role of the registering court is that articulated by Mathonsi J and Bhunu J in *Elvis Ndlovu and Mvududu (supra)* respectively.

Does an appeal to the Labour Court against the arbitral award affect registration?

The answer is No. This is because an appeal to the Labour Court does not suspend the operation of the arbitral award. Registration is still com-

73 *Trust Me Security Organization v Mararike & Ors* HH 325/2014.

74 HH 4/2012.

75 2012 (1) ZLR 93 (H).

76 2010 (1) ZLR 448 (H).

77 At p. 455C.

petent notwithstanding an appeal.⁷⁸ Chiweshe JP had this to say in *Samudzimu v Dairibord Holdings Ltd*:⁷⁹

In the present case, the respondent has lodged an appeal with the Labour Court. The appeal is still pending. Should the respondent wish to have the arbitrator's determination suspended pending appeal or dealt with in any other interim way, it is to that court that it must direct its application. Accordingly, for as long as the arbitral award has not been suspended or set aside on review or on appeal in terms of the Labour Act, there is no basis upon which this court may decline registration of the same.

Does the Labour Court have power to suspend registration pending determination of an appeal?

Section 92E(3) gives power to the Labour Court to 'make such interim determination in the matter as the justice of the case requires'. Does this power include the power to suspend registration? The answer is No. The Labour Court cannot suspend the operation of a provision of the Labour Act or of any other enactment in the absence of clear and express stipulations to that effect. Registration is distinct from execution. Registration enables execution. What the Labour Court has power to do under section 92(E)(3) is the stay of execution. It cannot stay registration. Where the Labour Court has already suspended the operation of an arbitral award before its registration, the arbitral award is still registrable, but upon registration its execution is stayed.

The effect of registration and the power to stay execution

The effect of registration is stated in section 98(15) as follows:

Where an arbitral award has been registered in terms of subsection (14) it shall have the effect, for purposes of enforcement, of a civil judgment of the appropriate court.

It is an overstatement to read this provision as converting a registered arbitral award into a civil judgment of the appropriate court. Only 'for purposes of enforcement' is it regarded as a civil judgment of the appropriate court. For example, for the purposes of an appeal, it is not to

⁷⁸ *Samudzimu v Dairibord Holdings Ltd* HH 204/2010; *Giya v Ribi Tiger Trading* HH 57/2014; *Senate Dhlomo-Bhala v Lowveld (supra)*._

⁷⁹ 2010 (2) ZLR 357 (H) at p. 360.

be regarded as a civil judgment of the appropriate court. Section 98(15) means that for all other purposes, a registered award does not lose its character as an arbitral award. Accordingly, for purposes of the interim relief contemplated under section 92E(3), a registered arbitral award is no different from an unregistered arbitral award. This means that under section 92E(3), the Labour Court may suspend the effect of an arbitral award pending the determination of an appeal. Where the suspended arbitral award is already registered, the suspension has the effect of a stay of execution. The notion that the Labour Court cannot suspend the judgment of the High Court is thus based on a misconception of the import of section 98(15).

Whenever an arbitral award is registered, two courts have concurrent jurisdiction over its stay of execution. The first court is the registering court. ‘For purposes of enforcement’ necessarily carries with it a stay of enforcement. The registering court has the same power over the registered arbitral award as it has over its own judgment. The second court is the Labour Court under section 92E(3). Despite registration, an arbitral award remains an arbitral award and, once seized with an appeal, the Labour Court, by necessary implication, may suspend the operation of the award in order not to make its own appeal academic.

The concurrent jurisdiction over registered arbitral awards is unavoidable and was clearly intended by the Legislature. How can it be avoidable in a scheme which provides appeals to a court different from the court that has control over enforcement?

Concurrent jurisdiction does not mean that a party seeking a stay of execution may institute proceedings in both courts. Section 124(1) of the Act has a mechanism to regulate multiple proceedings.

In *Zimbabwe Open University v Gideon Magaramombe & Deputy Sheriff Harare N.O.*,⁸⁰ Chidyausiku CJ (in chambers) hinted his support for this position on the import of section 98(15):

I entertain serious doubts as to whether the mere registration of the arbitral award with the High Court has the effect of erasing or rendering null and void the prior order of the Labour Court suspending the execution of the arbitral award.

It is wrong for the High Court to decline jurisdiction to grant an order

80 SC20/2012 at p. 6.

staying execution of a registered arbitral award merely on the basis of a pending appeal in the Labour Court. Ziyambi JA (in chambers) was therefore correct in *University of Zimbabwe v Kwanele Jirira & Ors*⁸¹ when she said:

I granted the application at the end of the hearing because I was of the view that, the award having become an order of the High Court upon registration by that court, the court a quo misdirected itself in holding that it did not possess the jurisdiction to grant the order sought.

In *Dhlodhlo v Deputy Sheriff, Marondera & Ors*,⁸² Gowora J (as she then was) was of the view that the Labour Court had no jurisdiction over arbitral awards registered with the High Court:

*Effectively, therefore, once this court issued an order registering the award in favour of the applicant, upon the registration, the award became to all intents and purposes a judgment of the High Court. The contention by the applicant is that, as a result of the registration, the Labour Court ceases to have jurisdiction over the judgment and it cannot control, vary, set aside or rescind the judgment. I think this is a correct exposition of the law. The effect of the registration with this court is that only the High Court, barring an appeal to the Supreme Court, can interfere with the judgment or its execution.*⁸³

For reasons already outlined, this is incorrect.

An arbitral award is effective and binding when it is made.⁸⁴ Its enforceability is a separate issue. Its enforceability which is dependent on registration. Its binding effect is automatic upon its grant.⁸⁵ Makoni J made this point in *Dudka & Ors v Cheni Investments*⁸⁶ as follows:

Article 35 brings out two distinctive features of an arbitral award. The first one is its binding nature and the second

81 SC 6/2013 at p. 3.

82 2011 (1) ZLR 416 (H).

83 At p. 422G.

84 Article 35 of the Model Law.

85 *Dudka & Ors v Cheni Investments (Pvt) Ltd & Ors* 2011 (1) ZLR 1 (H).

86 *Supra*.

*one its enforceability. I agree with the submissions made on behalf of the applicants that an award takes effect upon its grant. Its execution has no effect on whether it is binding or not. A party can choose to obey an award, such that there would not be need for the award to be registered. Registration allows for execution.*⁸⁷

The failure to separate registration from execution emerged in *Kingdom Bank Workers' Committee v Kingdom Bank Financial Holdings*⁸⁸ where Patel J (as he then was) refused to register an award on the basis that the award had been suspended by the appeal to the Supreme Court against the decision of the Labour Court upholding the arbitrator's award. A suspended award is registrable but its execution is suspended by operation of law if there is a valid appeal to the Supreme Court against the Labour Court decision upholding it.

Format of order of registration

The format of the order granted by the registering court is usually as follows:

1. The arbitral award dated ... and issued by arbitrator ... be and is hereby registered as an order of this court in terms of section 98(14) of the Labour Act.

In terms of the said arbitral award, the respondent is hereby ordered to pay the applicant the sum of ...

3. The respondent is to pay the costs of this application.

Effect of an appeal against an arbitral award

Section 92E(2) states the effect of the appeal to the Labour Court is as follows:

An appeal in terms of subsection (1) shall not have the effect of suspending the determination or decision appealed against.

This provision affects all appeals to the Labour Court. It was introduced by the 2005 amendments and altered the previous position where-

⁸⁷ At p. 6B.

⁸⁸ 2012 (1) ZLR 93 (H).

in an appeal suspended the decision appealed against.⁸⁹ Notwithstanding the clear import of section 92E(2), there are some isolated voices to the contrary.⁹⁰ The overwhelming position, however, is that section 92E(2) applies to all appeals, including an appeal against an arbitral award in terms of section 98. As Mafusire J aptly pointed out:

*Section 92E is an omnibus provision regarding all appeals made in terms of the Labour Act. It must necessarily cover appeals from determinations or decisions of the arbitrator to the Labour Court. There is nothing in the Act to suggest that the Legislature evinced a contrary intention.*⁹¹

Other cases that are clear on this point include *DHL International (Pvt) Ltd v Madzikanda*,⁹² *Gaylord Baudi v Kenmark Builders (Pvt) Ltd*,⁹³ *Elvis Ndlovu v Higher Learning Centre*,⁹⁴ *Samudzimu v Dairibord Holdings Ltd*⁹⁵ and *Kingdom Bank Workers' Committee v Kingdom Bank Financial Holdings*.⁹⁶

Gowora J, without referring to the cases, abandoned her position in *Dhlodlo in Husaihwevhu & Ors v UZ-USF Collaborative Research Programme*,⁹⁷ she said section 92E(2) was 'clear and unambiguous' and an arbitral award was not suspended on appeal to the Labour Court.⁹⁸

Voluntary arbitration

This arises from the agreement of the parties. Parties to a labour dispute may enter into an arbitration agreement in which they agree to refer their dispute to voluntary arbitration. Such an agreement is valid and enforceable and a reference to a labour officer in terms of section 93 contrary

89 See for example *NetOne Cellular (Pvt) Ltd v NetOne Employees & Anor* 2005 (1) ZLR 275 (S).

90 See *Dhlodlo v Deputy Sheriff, Marondera & Ors* 2011 (1) ZLR 416 (H); *Mvududu v Agricultural and Rural Development Authority* 2011 (2) ZLR 440 (H).

91 *Senele Dhlomo-Bhala v Lowveld Rhino Trust* HH 263/2013 at p. 10.

92 2010.(1) ZLR 201 (H)

93 HH 4/2012.

94 HB 86/2010.

95 *Supra*.

96 2012 (1) ZLR 93 (H).

97 2010 (1) ZLR 448 (H).

98 See p. 451A.

to such an agreement will be invalid.⁹⁹ In that case, the parties had an agreement on how to deal with minimum conditions of service. Clause 6 of that agreement provided:

In the event that the representatives of the Edgars Group and the Managerial Employees Committee are unable to reach agreement on any subject of debate, then the matter shall be referred to external voluntary arbitration. The determination of the arbitrator shall be binding on both parties.

When the parties were unable to agree, the employees, in breach of clause 6, referred the matter to a labour officer under the then section 93 of the Labour Relations Act. The labour officer made a determination in favour of the employees. The employer challenged this position. The Labour Court agreed with the employer and this was endorsed by the Supreme Court. The latter held that clause 6 was an arbitration agreement in terms of article 7 of the Model Law and was enforceable. The courts have power to stay proceedings and refer the dispute to arbitration.

Voluntary arbitration is governed by the Arbitration Act, which incorporates the Model Law. The Model Law has a complete set of rules governing all important aspects of arbitration. Very few instances would require reference to the common law. Thus, in labour matters the parties are free to determine the number of arbitrators, failing which the number shall be one.¹⁰⁰ The appointment of the arbitrator or arbitrators is determined by the parties, and if for any reason the appointment procedure agreed by the parties fails, the High Court may be requested to make the appointment.¹⁰¹ The place of the arbitration is determined by the parties, failing which it is determined by the arbitrator, having regard to the convenience of the parties.¹⁰² Where there is more than one arbitrator, the decision shall be that of the majority.¹⁰³ The award must be in writing and be signed by the arbitrator or arbitrators. It must State the reasons upon which it is based.¹⁰⁴

99 *Edgars Stores Managers Association v Edgars Stores Ltd* SC 103/2004.

100 See the Proviso to Article 10 of Model Law.

101 Article 11 of the Model Law.

102 Article 19 of the Model Law.

103 Article 29 of the Model Law.

104 Article 31 of the Model Law.

Setting aside the award

An arbitration award can only be set aside under Article 34 of the Model Law. An arbitrator's award may not be taken on review in terms of section 26 of the High Court Act, as the arbitrator is not an inferior court of justice nor a tribunal nor an administrative authority.¹⁰⁵ Further, in enacting the Model Law, the Legislature took away the High Court's inherent jurisdiction to review the conduct of an arbitrator under the common law.¹⁰⁶ Consequently, it is wrong at law to use the review procedure in seeking to set aside an arbitrator's award.

An application for the setting aside of an arbitral award can only be by way of an application in terms of Article 34. It cannot be by way of review in terms of the High Court Rules.¹⁰⁷ Article 34 is part and parcel of a statute and therefore holds dominance over the High Court Rules, which are subsidiary legislation.¹⁰⁸ There are two main differences between an application under Article 34 and a review in terms of the High Court Rules. These are (i) under Article 34, the High Court is confined to setting aside the impugned award and cannot make any other order, and (ii) the time limit for a review application is eight weeks, subject to extension for good cause, while the period stipulated under article 34 is three months and there is no room for an extension. If the application is not made within the three-month period, the right to have the award set aside is irrevocably lost.¹⁰⁹

The use of a wrong procedure would make the application fail for that reason alone.¹¹⁰ In *NSSA v Chairman, NSSA Workers' Committee & Ors*,¹¹¹ the arbitration proceedings related to a wages dispute between NSSA and its workers' committee. The arbitrator made an award but did not give reasons for the award. NSSA challenged the award on a number of grounds. The first ground was that the award did not comply with Article 31(2) of the Model Law in that it did not State the reasons upon which it was based. It was argued that an award which did not comply

105 See *NSSA v Chairman, NSSA Workers' Committee & Ors* 2002 (1) ZLR 306 (H).

106 Ibid.

107 *Mietwa & Anor v Mupamhadzi* 2007 (1) ZLR 253 (S); *Star Africa Corp Ltd v Sivnet Investments (Pvt) Ltd & Anor* HC 7123/2010..

108 Ibid.

109 Ibid .

110 Ibid.

111 2002 (1) ZLR 306 (H).

with Article 31(2) of the Model Law was a nullity. The second ground was that failure to give reasons showed that the award was arbitrary and irrational. It was also said that the award was contrary to public policy. Regarding the first ground, the court held that the failure of an award to comply with all the requirements of Article 31 did not make it a nullity. The appropriate remedy is to approach the court for an order for *mandamus*. Smith J stated the law as follows:

*I consider that it would go against the spirit of the UNCITRAL Model Law to hold that, if an award did not comply with all the requirements of Article 31, it was a nullity. That would mean that if the arbitrator did not State the date of the award or the place of the arbitration, the award would be a nullity. That, to my mind, would be too formalistic an approach.*¹¹²

Regarding the second ground, the court held that the mere fact that the arbitrator did not State his reasons did not mean that he had not applied his mind to the issues. The arbitrator had made an award of an increase in wages which was midway between what the employer offered and what the workers wanted. This could not be said to be so far-reaching and outrageous in its defiance of logic or accepted moral standards that it could not be accepted by a sensible, fair-minded person.

In *Pamire & Ors v Dumbutshena NO & Anor*.¹¹³ the arbitrator, in an award of damages for breach of contract, granted full damages to the second respondent despite the latter's own failure to meet all its obligations under the contract. The award was set aside as being contrary to public policy in that it violated elementary notions of justice.

Practical differences between compulsory arbitration and voluntary arbitration

The above discussion shows some practical differences between compulsory arbitration and voluntary arbitration which are worth summarizing for purposes of emphasis. Compulsory arbitration is regulated by the Labour Act, but leaving some aspects for the Arbitration Act. Voluntary arbitration is governed exclusively by the Arbitration Act. A critical practical difference relates to the issue of finality of the arbitra-

112 At p. 314B.

113 2001 (1) ZLR 123 (H).

tion award. With compulsory arbitration, an arbitration award may be appealed against on a 'question of law' to the Labour Court. An arbitral award emanating from voluntary arbitration cannot be appealed against. It can only be set aside by way of application to the High Court on the very restricted grounds in Article 34 of the Model Law. Attempts by the Labour Court to hear appeals from, or review, voluntary arbitration proceedings have been authoritatively thwarted by the Supreme Court.¹¹⁴ In practice, awards from voluntary arbitration are, in general, final while those from compulsory arbitration tend to be, as a matter of routine, appealed against to the Labour Court.

The other practical differences relate to the appointment of arbitrators and the conduct of the arbitration process.

The essence of voluntary arbitration is the finality of the award. This was underscored by Goldstone JA *In Amalgamated Clothing & Textile Workers' Union of South Africa v Veldspan (Pty) Ltd*¹¹⁵ as follows:

When parties agree to refer a matter to arbitration, unless the submission provides otherwise, they implicitly, if not explicitly ... abandon the right to litigate in courts of law and accept that they will be finally bound by the decision of the arbitrator. There are many reasons for commending such a course, and especially so in the labour field where it is frequently advantageous to all the parties and in the interests of good labour relations to have a binding decision speedily and finally made. In my opinion the courts should in no way discourage parties from resorting to arbitration and should deprecate conduct by a party to an arbitration who does not do all in his power to implement the decision of the arbitrator promptly and in good faith.

These comments were endorsed by the Zimbabwe Supreme Court in *Catering Employers Association of Zimbabwe v Zimbabwe Hotel & Catering Workers' Union & Anor.*¹¹⁶

Given that a voluntary arbitration award can only be set aside in terms of Article 34(2) of the Model Law, it is instructive to examine the permis-

114 *Zimbabwe Educational, Scientific, Social and Cultural Workers' Union v Welfare Educational Institutions Employers Association* SC 11/2013.

115 1994 (1) SA 162 (A) at 169 F-H).

116 2001 (2) ZLR 388 (S) at pp. 391-92.

sible grounds under that Article. Its provisions are worth reproducing:

An arbitral award may be set aside by the High Court only if:

- (a) the party making the application furnishes proof that:
 - (i) a party to the arbitration agreement referred to in article 7 was under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication on that question, under the law of Zimbabwe; or
 - (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
 - (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decision on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or
 - (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Model Law from which the parties cannot derogate or, failing such agreement, was not in accordance with this Model Law; or
- (b) the High Court finds, that –
 - (i) the subject matter of the dispute is not capable of settlement by arbitration under the laws of Zimbabwe; or
 - (ii) the award is in conflict with the public policy of Zimbabwe.”...

Article 34(5) adds:

For the avoidance of doubt, and without limiting the generality

of paragraph (2)(b)(ii) of this article, it is declared that an award is in conflict with the public policy of Zimbabwe if -

- (a) the making of the award was induced or effected by fraud or corruption; or
- (b) a breach of the rules of natural justice occurred in connection with the making of the award.

The grounds under 34(2)(a) are, in general, straightforward. For instance, in terms of Article 34 (2)(a)(iii) it is not competent for an arbitration award to deal with a matter which has not been referred to arbitration. The case of *Catering Employers Association (supra)* illustrates this point. The parties had referred to the issue of 'material transport' but the Tribunal ordered the payment of a 'transport allowance'. Regarding a housing allowance, the Tribunal back-dated its award yet the issue of back-dating had not been referred to it. Both aspects were set aside under Article 34 (2)(a).

The ground which raises legal difficulties is 34(2)(b)(ii), namely that 'the award is in conflict with the public policy of Zimbabwe.' The Model Law, without exhausting the meaning of this ground, gives two instances where an award is in conflict with public policy. These are (i) where the making of the award was induced or effected by fraud or corruption, and (ii) where a breach of the rules of natural justice occurred in connection with the making of the award.¹¹⁷ Rules of natural justice are designed to achieve fairness in the decision-making process. Thus, both parties must be treated equally and each must be given an opportunity to be heard (the *audi alteram partem* rule).¹¹⁸

Further, an arbitrator must not be a judge in his or her own cause (the *nemo judex sua* principle). This requires acting without bias and disclosing any interest he or she has or might reasonably be thought to have in the dispute.¹¹⁹

Outside these two instances, the scope of public policy remains difficult and contentious. The *locus classicus* appears to be *ZESA v Ma-*

117 See Articles 34(5)(a) and 36(3)(a).

118 See *FSI Holdings Ltd v Rio Tinto Zimbabwe Ltd & Anor* 1997 (1) ZLR 31 (S).

119 See *Leopard Rock Hotel Co (Pvt) Ltd v Walenn Construction (Pvt) Ltd* 1994 (1) ZLR 255 (S).

posa,¹²⁰ where the Supreme Court held that the notion of public policy must be interpreted restrictively, so as to limit the scope of setting aside arbitration awards. Gubbay CJ had this to say:

*In my opinion, the approach to be adopted is to construe the public policy defence as being applicable to either a foreign or domestic award, restrictively in order to preserve and recognize the basic objective of finality in all arbitrations, and to hold such defence applicable only if some fundamental principle of the law or morality or justice is violated.*¹²¹

The issue becomes one of determining what is it that amounts to a violation of a fundamental principle of the law or morality or justice. Clearly, not every violation of the law or justice meets this standard. The violation must be of a fundamental nature. As Gubbay CJ emphasized;

An award will not be contrary to public policy merely because the reasoning or conclusions of the arbitrator are wrong in fact or in law. In such a situation, the court would not be justified in setting the award aside... where, however, the reasoning or conclusion in an award goes beyond mere faultiness or incorrectness and constitutes a palpable inequity that is so far reaching and outrageous in its defiance of logic or accepted moral standards that a sensible and fair minded person would consider that the conception of justice in Zimbabwe would be intolerably hurt by the award, then it would be contrary to public policy to uphold it.

In other words, a violation is of a fundamental nature and thus contrary to public policy if it would be so regarded by a ‘sensible and fair minded person’. Each case will therefore be determined on its own facts. In *ZESA v Maposa (supra)* itself, the arbitration award was set aside on this ground. In that case, Maposa was suspended, with pay, from his position as corporate services director on 28 August 1996. Thereafter,

120 1999 (2) ZLR 452 (S). There are several cases on the public policy defence: *Chanakira v Mapfumo & Anor* 2010 (2) ZLR 178 (H); *Muchaka v Zhanje & Anor* 2009 (2) ZLR 9 (H); *City of Harare v Harare Municipal Workers’ Union* 2006 (1) ZLR 491(H); *Beazley NO v Kabell & Anor* 2003 (2) ZLR 198(S); *Delta Operations (Pvt) Ltd v Origen Corporation (Pvt) Ltd* 2007(2) ZLR 81 (S); *Provincial Superior, Jesuit Province of Zimbabwe v Kamoto & Ors* 2007 (2) ZLR 8(S).

121 At p. 465 D.

an investigation was carried out by the company's internal auditors into various irregularities. At the conclusion of the investigations, the ZESA Board wrote to Maposa on 24 December 1996, offering him an opportunity to resign from employment and avoid a suspension without pay pending disciplinary proceedings. Maposa refused to resign, whereupon ZESA suspended him without pay on 5 February 1997 pending a disciplinary hearing in terms of the code of conduct. However, before ZESA could proceed in terms of the code, Maposa instituted proceedings in the High Court seeking an order, inter alia, that the dispute be referred to an independent arbitrator. The essence of the order sought was that the company's code of conduct be not followed as that would have involved the ZESA Board of directors whom Maposa felt had prejudged his guilt. This order was granted, with the consent of the parties. The arbitrator was required to determine the lawfulness or otherwise of Maposa's suspension and whether or not Maposa was guilty of any misconduct. In the award, the arbitrator ruled that ZESA had failed to comply with section 13(2) of its code of conduct after suspending Maposa on 24 December 1996. Accordingly, it regarded the suspension as a nullity and ordered ZESA to pay Maposa his salary and benefits from 24 December 1996 up to the hearing on 29 January 1998. The reasoning which led to this award was based on the mistaken notion that Maposa had been suspended without pay and benefits on 24 December 1996. Maposa was only suspended without pay and benefits on 5 February 1997. Arising out of this error, the arbitrator failed to apply his mind to the issue that it was Maposa who, by his application to the High Court, made it impossible for ZESA to comply with its code of conduct. The Supreme Court held that the effect of the enforcement of the arbitral award would have allowed Maposa to take advantage of a position he had deliberately engineered: it was him who applied to the High Court to prevent ZESA from proceeding under the code of conduct and yet the award was holding his suspension unlawful on the basis that the code of conduct had not been complied with. This error was regarded as a fundamental violation of Zimbabwe's elementary notions of justice and therefore contrary to public policy. The award was set aside.

In Tel-One (Pvt) Ltd v Communication & Allied Services Worker's Union of Zimbabwe,¹²² wage negotiations were referred to arbitration. The

122 2007(2) ZLR 262 (H)

arbitrator's award was ambiguous. On one interpretation, the increase was such that the employer would have been driven into insolvency, as the increase was more than its income. On another, it was an affordable increase. The employer sought to have the award set aside on the grounds that it was contrary to public policy. Hungwe J granted the application and set aside the award. He said:

There is no doubt in my mind that the spirit of collective bargaining between employer and employee is to arrive by consensus or, if that fails, by arbitration, at what a fair wage is. The idea is to preserve the employer-employee relationship. The employee makes his labour available for a fair fee. The employer engages the employee on acceptable terms and conditions. The employer employs his resources to ensure that the goose that lays the golden eggs for their mutual benefit continues to do so. Society expects these mutually beneficial outcomes. The economy thrives and so does the community generally, and its members in particular. An award that plunges the apple-cart over the cliff could not, in my view, be said to be in the best interests of the general good of Zimbabwe.

The courts, and indeed all tribunals delegated with decisions of a financial nature, would be failing in their duty if they were to willy-nilly give awards whose effect would be to drive corporations into insolvency, thereby destroying the economic fabric of the nation. Such awards would defeat the very purpose they are meant to serve. As such, they are liable to be set aside as being in conflict with the public policy of Zimbabwe.¹²³

A common situation is where an employer challenges an award on wages on the simple basis that the rates thereof are unsustainable. In other words, that the employer has no capacity to pay the rates provided for in the award. If there is evidence that the arbitrator carefully considered the employer's capacity to pay and took into account the employer's arguments, the award will not be set aside on the ground of being contrary

123 Ibid.

to public policy.¹²⁴ If an employer chooses not to give evidence of its capacity to pay the demanded salary, it leaves it to the arbitrator to determine the issue as best he or she can on the papers. It cannot raise inability to pay on appeal.¹²⁵ This is because there would be no evidence on which the appellant court can interfere with the arbitral award.

In an application for the setting aside of a voluntary arbitration award, the High Court's powers are limited to two options, either upholding or setting aside the award. It is not entitled to remit the matter to the arbitrator for redetermination. The justification given for this is that the autonomy of the parties in arbitration must be preserved. This position was enunciated by the Supreme Court in *ZESA v Maposa (supra)* in the following words:

*Party autonomy is a paramount feature under the arbitration regime in this country and where a court sets aside an arbitral award it may not usurp this right of the parties by remitting the matter to the arbitrator for re-determination. It must leave it to the parties to proceed as they deem fit.*¹²⁶

Awards made by arbitrators in compulsory arbitration may be appealed against on a 'question of law'. This weakens their finality because the expression 'question of law' has been given the same meaning as that given by the Supreme Court to section 92 dealing with appeals from the Labour Court to the Supreme Court. 'Question of law' has been given such a wide meaning that even questions of fact may be appealed against if the arbitrator's finding of fact is characterized as a serious misdirection.

Enforcement of voluntary arbitration award

The enforcement of a voluntary arbitration award requires an application in writing to the High Court in terms of Articles 35 and 36 of the Model Law.

124 See *City of Harare v Harare Municipal Workers' Union* 2006 (1) ZLR 491 (H).

125 *Midlands State University Council v Midlands State University Lecturers' Association* 2005 (2) ZLR 213 (S).

126 At p. 467 B-C.

CHAPTER THIRTEEN

DISPUTE SETTLEMENT

2. ADJUDICATION IN THE LABOUR COURT AND THE SUPERIOR COURT

The old law

The 1985 Labour Relations Act provided for a system of labour courts which had no less than six levels, as follows:

(i) *Labour relations officer*

The labour relations officer was the starting level for referring any dispute or unfair labour practice. He or she was required to investigate the matter first before exercising any of the other powers conferred by the Act.¹ After the investigation, the labour relations officer had five options: either to conciliate, or to make a determination, or to refer the matter to a workers' committee, trade union, employers organization or employment council, or to refer the matter to a hearing officer or the Labour Relations Board, or to refer the matter to compulsory arbitration if it involved one or more trade unions or employers.

(ii) *Hearing officer*

This could only operate as a second level of the process after reference of a matter by a labour relations officer. The hearing officer had the

1 Section 109 of the 1985 Act.

power to make a determination but could also refer the matter to another authority or appropriate court if he or she considered that the matter ought not to have been referred to a hearing officer.²

(iii) Regional Hearing Officer

An appeal from a hearing officer or a labour relations officer lay with the Regional Hearing Officer, who had the power to confirm, vary or set aside the decision appealed against.

(iii) Labour Relations Board

An appeal from a regional hearing officer lay with the Labour Relations Board. However, the right of appeal was not automatic: leave had to be obtained from either the regional hearing officer or from a member of the Board if the former refused.³ Although there was no specific requirement in the Act that its composition be tripartite in character, it appeared that the practice was for the Minister to appoint a person representing each of the three social partners: trade unions, employers' organization and Government. Three members of the Board constituted a quorum and decisions were by majority.⁴ The Board could also hear matters referred to it by a labour relations officer.

(iv) Labour Relations Tribunal

An appeal from the Labour Relations Board lay with the Labour Relations Tribunal,⁵ which also had the function of hearing and determining certain matters at first instance, such as compulsory arbitration.⁶

(v) Supreme Court of Zimbabwe

Appeals from the Labour Relations Tribunal on matters of fact or law lay with the Supreme Court.⁷

The 1992 amendment made changes to this structure in three significant ways. Firstly, it shortened the system by abolishing the Labour Relations Board, by merging the function of the labour relations officer and hearing officer and by recasting the regional hearing officer as a senior labour relations officer. Thus, a dispute could now first be referred to a

² Section 111(1) of the 1985 Act.

³ Section 113 of the 1985 Act.

⁴ Section 93 of the 1985 Act.

⁵ Section 98 (2) of the 1985 Act.

⁶ Section 106(a), as read with section 117 of the 1985 Act.

⁷ Section 108 (2) of the 1985 Act.

labour relations officer and thereafter, or if any party is aggrieved, to a senior labour relations officer.⁸ There was a further right of appeal to the Labour Relations Tribunal.⁹ An appeal from the Labour Relations Tribunal was restricted to questions of law only.¹⁰ This meant that for decisions on matters of fact, the Labour Relations Tribunal was the final port of call.

Secondly, through the system of workplace codes of conduct, the Act removed a substantial number of disputes from labour relations officers. Section 101(5) provided:

Notwithstanding this Part ... no labour relations officer or senior labour relations officer shall intervene in any dispute or matter which is or is liable to be the subject of proceedings under a code nor shall he intervene in any such proceedings.

Thirdly, it sought to make the Labour Relations Tribunal better placed to resolve cases more expeditiously. Whereas under the 1985 Act, the Tribunal was constituted by at least three members, with the amendment, one member could constitute the Tribunal.¹¹ This was intended to ensure that there could be as many Tribunal sittings at a time as there were serving members of it. To make it less difficult to fill vacancies in the Tribunal, some qualifications for appointment were relaxed. Whereas under the 1985 Act, both the Chairman and the Deputy Chairman were required to be persons qualified to be High Court judges,¹² after the amendment, only the Chairman was required to have such a qualification.¹³ The Deputy Chairman needed only to be a registered legal practitioner, while other members no longer had to be persons ‘having wide experience in labour relations’ but could be either ‘qualified legal practitioners or persons experienced in labour relations’.¹⁴ One thorny issue which the amendment did not address was the involvement of the High Court in labour dispute resolutions. The amendment did not make the labour dispute resolution system in the Act the

8 Section 93 substituted by section 24 of the Amendment.

9 Section 97.

10 Section 92 (2).

11 Section 90 (1).

12 Section 99 (4) of the 1985 Act.

13 Section 83 (4)(a).

14 Section 83(2)(c).

exclusive system for resolution of labour disputes, so that parties still had recourse to the High Court in certain circumstances.

The current law

The new law was introduced by the 2002 amendments. The old system was overhauled and in the place of a 'labour court system' with various levels, a new and proper Labour Court was introduced. The senior labour relations officer was abolished. The role of the labour officer was recast. Labour officers could only do conciliation and arbitration. The role of adjudication was taken away. Only the Labour Court could do adjudication in the technical sense. After 2002, it is no longer accurate to refer to a 'labour court system' as labour officers have ceased to operate like 'labour courts'. The new role of labour officer in conciliation and arbitration has already been discussed.

Under the 2002 amendments, the Labour Court was established in terms of section 84 as a special court and a court of record. The head of the court was referred to as the Senior President, while the other judges of the court were called 'Presidents'. The court consisted of a Senior President and such number of Presidents as were determined by the State President after consultations with the Judicial Service Commission.¹⁵ Three categories of persons qualify for appointment as a President of the Labour Court, namely (i) a former judge of the Supreme Court or the High Court, (ii) a person qualified to be a judge of the High Court, and (iii) a person who has been a magistrate in Zimbabwe for not less than seven years.¹⁶

The Constitution and the Labour Court

Following the enactment of the Constitution of Zimbabwe, 2013, the Labour Court is now established by the Constitution itself. Section 172 of the Constitution establishes the Labour Court as a court of record consisting of a Judge President and such other judges as may be appointed from time to time. It is given 'such jurisdiction over matters of labour and employment as may be conferred upon it by an Act of Parliament'. The Labour Act therefore remains the relevant Act of Parliament setting out the jurisdiction and powers of the Labour Court.

¹⁵ Section 84(2).

¹⁶ Section 85.

Composition of the Labour Court

The major change brought about by the Constitution is that the qualifications and the process of appointment of judges of the Labour Court are the same as those of the High Court.¹⁷ To be appointed a judge of the Labour Court a person must be at least 40 years old and either be or have been a judge of a court with unlimited jurisdiction in civil or criminal matters in a country in which the common law is Roman-Dutch or English and English is an officially recognized language or has been qualified to practise as a legal practitioner for at least seven years and is currently so qualified to practise.¹⁸

On a practical note, the head of the Labour Court is now called the Judge President (and not Senior President) while the other judges are referred to as judges (not presidents). All the other provisions of the Labour Act on the Labour Court remain valid notwithstanding the enactment of the Constitution of Zimbabwe, 2013.

In terms of section 84 (2) of the Labour Act, assessors may be appointed to sit with judges of the Labour Court. An assessor must be a person who has knowledge or experience in labour relations.¹⁹ The Judge President of the Labour Court, in consultation with the Minister, is required to prepare a list of not less than ten persons who may be appointed as assessors.²⁰ It is from this list that an assessor is selected from case to case.

A sitting of the Labour Court may be constituted by one or more Judges sitting by themselves or with one or more assessors.²¹ This means that one Judge on his or her own may constitute a valid sitting of the Labour Court. It may also be one Judge and one assessor, or one Judge and two or more assessors, or two Judges and one assessor and so on. An assessor has no voice in any question of law or any question as to whether a matter for decision is a question of fact or of law or any question as to the admissibility of evidence.²² Assessors have a voice of equal weight to that of a Judge in all questions of fact. Where the Labour Court is constituted by more than one Judge, all questions that fall for decision shall be by ma-

17 Section 179 & 180 of the Constitution.

18 Section 179 of the Constitution.

19 Section 86(1)(a).

20 Section 86(1)(a).

21 Section 90(1).

22 Proviso to section 90(2).

jority decision.²³ However, where the opinions of Judges of the Labour Court are equally divided, the decision of the Judge presiding over the Labour Court shall be the decision of the Court.²⁴

Jurisdiction of the Labour Court

The functions, powers and jurisdiction of the Labour Court are specified in section 89. The following provisions of section 89 are worth reproducing:

- (1) The Labour Court shall exercise the following functions –
 - (a) hearing and determining applications and appeals in terms of this Act or any other enactment; and
 - (b) hearing and determining matters referred to it by the Minister in terms of this Act; and
 - (c) referring a dispute to a labour officer, designated agent or person appointed by the Labour Court to conciliate the dispute if the Labour Court considers it expedient to do so; and
 - (d) appointing an arbitrator from the panel of arbitrators referred to in subsection (6) of section *ninety-eight* to hear and determine an application;
 - (e) doing such other things as may be assigned to it in terms of this Act or any other enactment.
- (2) In the exercise of its functions, the Labour Court may -
 - (a) in the case of an appeal-
 - (i) conduct a hearing into the matter or decide it on the record; or
 - (ii) confirm, vary, reverse or set aside the decision, order or action that is appealed against, or substitute its own decision or order; or
 - (iii) exercise the same powers of review as would be exercisable by the High Court in relation to the decision, order or action that is appealed against or any proceedings connected therewith; or
 - (iv) refer the matter back to the body, person or

²³ Section 90(2).

²⁴ Proviso to section 90(2).

authority concerned for further consideration; ...

- (6) No Court, other than the Labour Court, shall have jurisdiction in the first instance to hear and determine any application, appeal or matter referred to in subsection (1).

Like any other specialist court, the Labour Court is a creature of statute and can only exercise that jurisdiction which is found within the four corners of the relevant statute. Any decision or order made without jurisdiction is a nullity.²⁵ The words ‘in terms of this Act or any other enactment’ severely limit the jurisdiction of the Labour Court. There must be a provision in the Act or other enactment conferring jurisdiction on the Labour Court. In *National Railways of Zimbabwe v Zimbabwe Railway Artisans’ Union*,²⁶ Ziyambi JA said:

There is, I think, judging from the cases which have come before us, a misconception generally held by the Labour Court, namely that it is, in terms of section 89 of the Act, endowed with jurisdiction to entertain all applications before it... Thus, before an application can be entertained by the Labour Court, it must be satisfied that such an application is an application ‘in terms of the Act or any other enactment’. This necessarily means that the Act or the other enactment must specifically provide for applications to the Labour Court, of the type that the applicant seeks to bring. See PTC v Chizema, section 108/2004... thus the application and the remedies obtainable thereby must be authorized in the Act... nowhere in the Act is the power granted to the Labour Court to grant an order of the nature sought by the respondents in the court a quo.

On the basis of this approach, it has been held that the Labour Court has no jurisdiction to issue a declaratory order.²⁷ The Labour Court is not endowed with inherent jurisdiction to make a declaratory order.²⁸

25 See *Gwalazimba v PG Mechandising Ltd & Anor* 1993 (2) ZLR 215 (S).

26 2005 (1) ZLR 341 (S) at 346F-347D.

27 *UZ-UCSF Collaborative Research Programme in Women’s Health v Shumuyarira* 2010 (1) ZLR 127 (S).

28 *Samanyau & Ors v Pleximail (Pvt) Ltd* 2011 (1) ZLR 527 (H); *Mudisi & Ors v Tomana NO & Ors* 2012 (1) ZLR 305 (H); *Agribank v Machingaifa & Anor* 2008 (1) ZLR 244 (S); *Mushoriwa v Zimbank* 2008 (1) ZLR 125 (H).

The Labour Court has jurisdiction where the cause of action and the remedy for that cause of action are provided for in the Labour Act.²⁹ It also has no jurisdiction to issue an interdict.³⁰ The Labour Court has no jurisdiction to hear an appeal from, or to review, voluntary arbitration proceedings because there is no provision in the Act or in any other enactment giving it jurisdiction to do so.³¹ For the same reasons, the Labour Court cannot order a *mandamus*. The expression ‘appropriate relief’ does not mean *any* relief. It means a relief specified in appropriate provisions of the Act. The Labour Court can only hear and determine applications for relief specified under the appropriate provisions of the Act.³²

Some High Court judges have generated needless controversy over section 89(6) which provides for exclusive jurisdiction by the Labour Court as a court of first instance in matters referred to in section 89(1). It is clear that this exclusive jurisdiction only exists for matters specified in section 89(1). If a matter is not so specified, the Labour Court has no exclusive jurisdiction as a court of first instance. In *Tuso v City of Harare*,³³ Bhunu J asserted that section 89(6) ousted the jurisdiction, at first instance, of all other courts in respect of all labour matters. This ouster also applied to the High Court’s inherent review jurisdiction. This approach is plainly wrong. It is not supported by the wording of section 89. The jurisdiction of all other courts is only ousted in respect of those matters specifically allocated to the Labour Court by section 89(1). This much is also common sense. Some judges of the High Court have stressed this point. In *Martin Sibanda & Godfrey Moyo v Benson Chinemhute N.O. & Anor*,³⁴ Makarau J said of section 89(6):

The words used in this section of the statute appear quite clear to me. They do not admit of doubt and therefore do not need to be interpreted. It appears to me that the intention

29 *Medical Investment Ltd v Pedzisayi* 2010 (1) ZLR 111 (H); *DHL International (Pvt) Ltd v Madzikanda* 2010 (1) ZLR 2010 (H); *Moyo v Gwindingwi NO & Anor* 2011 (2) ZLR 368 (H).

30 *National Railways of Zimbabwe v Zimbabwe Railway Artisans’ Union* (*supra*).

31 *Zimbabwe Education, Scientific, Social & Cultural Workers Union v Welfare Educational Institutions Employers Association* SC 11/2013.

32 *Barclays Bank of Zimbabwe Ltd v Shepherd Ndiraya* SC72/2005.

33 2004 (1) ZLR 1 (H). See also *Plaza Hotel (Pvt) Ltd v Marimbata & Anor* 2007 (1) ZLR 80(H); *ZIMASCO (Pvt) Ltd v Marikano* 2010 (2) ZLR 167 (H) at 176 H-177A.

34 HH 131/2004.

of the section, discerned from the language that it has used, is to take away jurisdiction from all other courts in the first instance in all applications, appeals and matters referred to in subsection (1) of the section... Putting its plain and grammatical meaning to the language employed in the section is leading me to the conclusion that jurisdiction in the first instance has been ousted from all other courts, this court included, in matters where the Labour Court has exclusive jurisdiction in terms of the Act.³⁵

Patel J. made the same point in *Hamilton Fortunate Gomba v Associated Mine Workers Union*³⁶ in the following words;

In my view, the words employed in the provisions under review are clear and unambiguous. The exclusive jurisdiction of the Labour Court apropos applications and appeals under the Labour Act is explicitly confined to the matters that I have enumerated and alluded to above. This exclusivity in the first instance does not extend to any other matter, whether in the realm of labour relations or elsewhere and whether in the nature of an application or appeal or other form of proceedings. The original jurisdiction of the High Court is expressly excluded in relation to the matters spelt out in section 89(1) of the Labour Act. However, it is not ousted and stands intact in relation to every other matter. Accordingly, the High Court remains vested with full and unimpeded jurisdiction to hear and determine every labour matter, other than one specifically referred to in subsections (1) and (6) of section 89 of the Labour Act.³⁷

The point that the exclusive jurisdiction in section 89(6) only relates to matters in section 89(1) is now settled.³⁸ As explained below, section 89(6) cannot oust the jurisdiction of the High Court, even in matters specified in section 89(1).

In the exercise of its jurisdiction, the Labour Court must ensure that

³⁵ At p. 3.

³⁶ HH 118/2005.

³⁷ At p. 6.

³⁸ *DHL International (Pvt) Ltd and Samudzimu (supra)*; *PG Industries (Zim) Ltd v Machawira* 2012 (1) ZLR 552 (H).

there is evidence before it to support any of its decisions or orders. In this respect, it must utilize section 90A which provides that (i) evidence may be adduced orally or in writing, and (ii) witnesses may be called, questioned and cross-examined. The onus is always on the applicant to prove his or her claims and not on the respondent to disprove the claims.³⁹

The Labour Court is empowered to make any of its decisions retrospective.⁴⁰ Labour Court orders cannot be enforced directly as Labour Court judgments. For purposes of enforcement, a decision or order or determination of the Labour Court must be registered in the magistrates' court or the High Court.⁴¹ In general, registration must be in the magistrates' court, with the High Court only being used where the decision or order exceeds the jurisdiction of the magistrates court.⁴² Once registered, the decision shall have the same effect for purposes of enforcement as a civil judgment of the appropriate court.⁴³

There are three circumstances in which the Labour Court may rescind or vary any order or determination it has made. These are where (i) the order was made as a default judgment, that is, in the absence of the party against whom it is made, (ii) the court is satisfied that the order is void or was obtained by fraud or a mistake common to the parties, and (iii) a patent error is being corrected.⁴⁴ In each of these three circumstances, notice must be served on all parties affected by the order or determination before the court considers whether or not to rescind.⁴⁵ No rescission is permissible where the order or determination is the subject of a pending review or appeal.⁴⁶ When an application for rescission is made, the Labour Court must determine it by considering such factors as the reason for the default, the prospects of success and the balance of convenience.⁴⁷

There is no legal basis for the Labour Court to issue a fresh order in the same matter when the previous order has not been set aside or

39 See *First Mutual Life Assurance Ltd v Muzivi* 2007 (1) ZLR 325 (S) at 328C-D.

40 Section 92B(1).

41 Section 92B(3).

42 Ibid.

43 Section 92B(4).

44 Section 92C(1).

45 Section 92C(2).

46 Section 92C(2).

47 *Redstar Wholesalers v Mutamba* 2005 (1) ZLR 411 (S) at 414C.

appealed against.⁴⁸

In general, where the Labour Court has reserved judgment, the parties have no right to file further heads of argument but a party has a right to apply to file such heads of argument.⁴⁹ When an application is made, the court is obliged to hear both parties and make a decision on whether or not to allow such filing. Where what is sought to be addressed in further heads of argument is an issue of law, the court should be slow to refuse to allow such further argument unless it is satisfied that such further argument would not take the matter any further or that it amounts to an abuse of court process.⁵⁰ This is because a point of law can be raised at any time, even for the first time on appeal, as long as its consideration involves no unfairness to the party against whom it is directed.⁵¹

The Labour Court can raise a point of law *mero motu* and determine the matter before it on the basis of that point of law even where neither party has raised it or where it is not an issue between the parties.⁵² For example, invalid proceedings are void *ab initio* and a court of appeal ought not to hesitate to intervene *mero motu*.⁵³

It is clear from section 89 that the Labour Court has three types of jurisdiction: (i) as a court of first instance when considering applications in terms of the Act or any other enactment, (ii) review jurisdiction, and (iii) as a court of appeal.

The Labour Court as a court of first instance

This jurisdiction arises in terms of section 93(7) after the failure of conciliation. There are two circumstances in which the jurisdiction arises. The first is where the labour officer has issued a certificate of no settlement but has not been able, for whatever reason, to refer the dispute to compulsory arbitration.⁵⁴ The second is where the labour officer refuses, for any reason, to issue a certificate of no settlement after the expiry of the period allowed for conciliation.⁵⁵ For the Labour Court to entertain

48 *Marcussen & Cocksedge v Dzikiti* 2007 (1) ZLR 146 (S).

49 *Zimasco (Pvt) Ltd v Maynard Farai Marikano* SC6/2014 at p. 6.

50 *Ibid.*

51 *Muchakata v Netherburn Mine* 1996 (1) ZLR 153 (S) at 157A.

52 *Zimbabwe Newspapers (1980) Ltd v Ndlovu* 2000 (1) ZLR 127 (S).

53 *Ibid.*

54 Section 93(7)(a).

55 Section 93(7)(b).

an application in terms of section 93(7) of the Act, the applicant must allege the jurisdictional basis, such as that it has not been possible to refer the matter to compulsory arbitration or the refusal to issue a certificate of no settlement. In the absence of that basis, the Labour Court has no jurisdiction.⁵⁶

Applications to the Labour Court are made in terms of rules of the court. There is no specific requirement that an application must be supported by an affidavit and the respondent's failure to attach an opposing affidavit in its opposition is not fatal.⁵⁷ Where a point *in limine* is raised regarding failure by the applicant to comply with the rules, the Labour Court must determine that point first before proceeding to consider the matter on the merits. It is a misdirection on a point of law for the Labour Court to refuse to do so.⁵⁸

It is not, at strict law, necessary to have all the names of employees reflected on the record as long as it is clear from the initial stages who the parties are and that the employer knows who is instituting the proceedings. There is no good reason to insist on the names being cited. In that case it is sufficient to say 'XYZ and ten others'.⁵⁹

The Labour Court as a court of appeal

This jurisdiction arises from various provisions of the Labour Act and other statutes. Appeals from determinations made in terms of an employment code lie to the Labour Court in terms of section 92D. In terms of section 98(10), an appeal on 'a question of law' from any decision of an arbitrator shall lie to the Labour Court. Section 26 of the Public Service Act provides for appeals to the Labour Court from any verdict reached or penalty imposed in terms of disciplinary proceedings under that Act.

Pending the hearing of an appeal, the Labour Court has power, in terms of section 92E(3), to make an interim determination as the justice of the case may require. This is power to grant interim relief pending an appeal. In making an interim determination, the Labour Court has a discretion and the Supreme Court will not interfere unless there is an error.⁶⁰

56 *Mukundi Plastics (Pvt) Ltd v Elijah Chasekwa & Ors* SC23/2011.

57 *Heywood Investments (Pvt) Ltd t/a GDC Hauliers v Pharaoh Zakeyo* SC32/2013.

58 *Ibid.*

59 *Wattle Co. Pine Division v Mark Marwisa & Ors* SC43/2004.

60 *Barclays Bank of Zimbabwe Ltd v Prize Mahachi* SC62/2004.

There is a right of appeal against an interim determination but it is an uphill task to obtain leave given its interlocutory nature.

As a court of appeal, the Labour Court can only deal with a matter on the basis of the grounds of appeal that have been raised by the appellant.⁶¹ In *Lawsign Nyarumbu v Sandvik Mining & Construction Zimbabwe(Pvt) Ltd*,⁶² the grounds of appeal before the Labour Court were confined to theft. There was no reference, in the grounds of appeal, to negligence and negligence was not canvassed by the parties in the proceedings before it. The court found the appellant guilty of negligence. This was set aside by the Supreme Court. Further, as a court of appeal, it is a serious misdirection for the Labour Court to deal with an issue which was not before the arbitrator.⁶³ However, there is a certain degree of latitude in proceedings in the Labour Court. For example, a notice of appeal to the Labour Court is not necessarily fatally and incurably defective merely because it does not set out the relief sought.⁶⁴

Many appeals are based on procedural irregularities. The general principle regarding procedural irregularities was stated by McNally JA in *Dalny Mine v Banda*⁶⁵ as follows:

As a general rule, it seems to me undesirable that labour relations matters should be decided on the basis of procedural irregularities. By this, I do not mean that such irregularities should be ignored. I mean that the procedural irregularities should be put right. This can be done in one of two ways:

(a) by remitting the matter for hearing de novo and in a procedurally correct manner;

(b) by the Tribunal hearing the evidence de novo.

In regard to the first of these alternatives, this court has previously said that:

‘The Tribunal is not given a discretion whether to remit or not. Once it decides that the proceedings were fatally irregular, and that it cannot come to

61 See *Chikanda v United Touring Co. Ltd* SC7/1999 at p. 3; *Lawsign* p. 6.

62 SC 31/2013.

63 *Augustine M. Tirivingana v The University of Zimbabwe* SC21/2013 at p. 6.

64 *Standard Chartered Bank v Chinyemba* 2004 (2) ZLR 197 (S).

65 1999 (1) ZLR 221(H) at 222.

*a conclusion on the merits, it has no choice but to remit.*⁶⁶

The main effect of this approach is that where an appeal attacks the procedures without addressing their merits, if the appeal court accepts that the disciplinary proceedings were flawed, it must remit the matter for a rehearing. In *Air Zimbabwe (Pvt) Ltd v Chiku Mnensa & Anor*,⁶⁷ Chidyausiku CJ stated:

*A person guilty of misconduct should not escape the consequences of his misdeeds simply because of a failure to conduct disciplinary proceedings by another employee. He should escape such consequences because he is innocent. There was no enquiry into the merits of respondent's conduct. The disciplinary proceedings were flawed. New disciplinary proceedings should have been instituted as was ordered by the General Manager of the appellant.*⁶⁸

It is a serious misdirection of the law for the Labour Court to determine a matter on a procedural irregularity which neither party has raised.⁶⁹ The Labour Court can only substitute its own decision for that appealed against where there is evidence before it on the basis of which it can make a decision.⁷⁰

The Labour Court exercising review jurisdiction

Before 2005, the Labour Court could only exercise its review jurisdiction when considering an appeal. This was changed in 2005. The Labour Court may now be approached directly for a review. This jurisdiction is in terms of section 89(1)(d1), which means that in respect of labour matters, the Labour Court shall exercise the same powers of review as does the High Court in other matters.⁷¹ This means that the usual grounds for review apply, the most notorious being three: illegality, irrationality and procedural impropriety. The grounds specified in the High Court Act,

66 This general approach has been emphasized in many cases: See *Proton Bakery (Pvt) Ltd v Takaendesa* 2005 (1) ZLR 60 (S); *Merchant Bank of Central Africa v Dube* 2004 (1) ZLR 155(S).

67 SC89/2004.

68 At p. 5.

69 *Proton Bakery (Pvt) Ltd v Takaendesa* 2005 (1) ZLR 60 (S).

70 *University of Zimbabwe v University of Zimbabwe Staff Association* SC8/2004.

71 *Zimasco (Pvt) Ltd v Maynard Farai Marikano* SC6/2014 at p. 4.

to the extent to which it may be suggested that they are not covered by these three, also apply.

Proceedings which are subject to review include (i) disciplinary proceedings in terms of the Model Code, (ii) proceedings under a code of conduct, (iii) the actions of a labour officer, (iv) the conduct and decision of the Registrar of Labour Relations, and (v) decision of the Minister of Labour. There are a number of decisions which a labour officer may make under section 93 or 98 which are liable to review. The labour officer may issue a certificate of no settlement when that is deemed inappropriate by one of the parties. He or she may refuse to issue a certificate of no settlement. The decision to refer a dispute to compulsory arbitration may also be challenged. The labour officer's choice of an arbitrator is another decision that may trigger a challenge.

Does the application for a review preclude the noting of an appeal or vice-versa? In other words, is an aggrieved party obliged to make an election: either an appeal or a review? The question was left open in *Small Enterprises Development Corporation v David Chemhere*.⁷² However, *Chikonye & Anor v Peterhouse*⁷³ appears to accept that an aggrieved party can do both.

The jurisdiction of the Labour Court in constitutional issues in labour matters

The Constitution is the supreme law of the country. Every court or tribunal is required to apply the provisions of the Constitution in its interpretation and application of the law. In other words, every court has jurisdiction to interpret and apply the provisions of the Constitution. The most important jurisdiction in constitutional matters is the power to make an order of constitutional invalidity of a law, practice or conduct. Not every court has this jurisdiction. For a court to exercise this jurisdiction, there must be a provision of the Constitution or other law providing for that jurisdiction. The Constitutional Court is a special court with the highest authority over constitutional matters. It is not the only court with jurisdiction in constitutional matters. Section 175(1) of the Constitution creates scope for every court to exercise jurisdiction in constitutional matters. However, section 175(1) is not, in itself, a basis for jurisdiction by every court. To exercise the jurisdiction under section 175(1), there

⁷² SC23/2002.

⁷³ 1999 (2) ZLR 329 (S) at 331.

must be a provision of the Constitution or other law providing for that jurisdiction. Outside the Constitutional Court, the Constitution only has specific provisions for the High Court and the Supreme Court. For the High Court, the basis of that jurisdiction is sections 171(1)(d) and 176. For the Supreme Court, it is section 176. At present, there are no Acts of Parliament giving constitutional jurisdiction to other courts. Accordingly, until there are, no court other than the High Court, the Supreme Court and the Constitutional Court has jurisdiction to order the constitutional invalidity of a law, practice or conduct.

The Labour Court has, therefore, no jurisdiction to order the constitutional invalidity of any law. To get this jurisdiction, the Labour Act or another enactment must provide for it in labour and employment matters. If a constitutional matter arises in any proceedings before the Labour Court, there are three options. The first is where a party to the proceedings requests, in terms of section 175(4), that the constitutional matter be referred to the Constitutional Court. If such request is made, the Labour Court has no discretion but to refer the matter unless the request is 'merely frivolous or vexatious'. The words 'frivolous or vexatious' were explained by Gubbay CJ in *Martin v Attorney-General & Anor*⁷⁴ as follows:

...the word 'frivolous' connotes, in its ordinary and natural meaning, the raising of a question marked by a lack of seriousness; one inconsistent with logic and good sense, and clearly so groundless and devoid of merit that a prudent person could not possibly expect to obtain relief from it. The word 'vexatious', in contra-distinction, is used in the sense of the question being put forward for the purpose of causing annoyance to the opposing party, in the full appreciation that it cannot succeed; it is not raised bona fide, and a referral would be to permit the opponent to be vexed under a form of legal process that was baseless.

The second option is for the Labour Court, *mero motu*, to exercise its discretion to refer the matter to the Constitutional Court. This discretion is granted by section 175(4). The third is to decide the matter without taking into account the constitutional issue and leave it to the parties to pursue the constitutional point on appeal or in an appropriate court.

74 1993 (1) ZLR 153 (S) at 157C.

Representation of parties before the Labour Court

A party to a matter before the Labour Court may appear in person or be represented by a legal practitioner or an official or employee of a registered trade union or employers' organization of which the party is a member.⁷⁵ The wording of section 92, which provides for this representation, is very restrictive. Thus, a co-worker or member of the workers' committee may not without also being an 'official' of a registered trade union, represent a party or participate in the proceedings before the Labour Court. An issue which may arise is whether or not an 'official or employee' of a registered federation of trade unions, as distinct from a 'registered trade union', is entitled to represent a party in a matter before the Labour Court. For example, is an official or employee of the ZCTU entitled to represent a member of any of its affiliates? It is submitted that the answer is 'Yes'. An analysis of the Labour Act shows that there are contexts where the words 'trade union' include a federation of trade unions. Such contexts arise where it would not make any sense to distinguish between a trade union and a federation of trade unions. Section 92 falls into this context. It would not make sense to prohibit an official or employee of a federation of trade unions from representing a member of any of its affiliates as that would defeat the very essence of a federation.

Condonation for failure to meet timelines in the Rules of Court

The starting point is to observe that legal procedures, particularly timeframes for certain steps in law, have a long legal history and serve legitimate purposes. Accordingly, whenever there is non-compliance with a procedural rule, condonation may only be granted where it would be manifestly unjust not to do so, having regard to the interests of both parties. It is all about justice and fair play. In *Kodzwa v Secretary for Health & Anor* 1999 (1) ZLR 313 (S), the Supreme Court accepted the following Herbstein & van Winsen's approach to applications for condonation:

Condonation of the non-observance of the rules is by no means a mere formality. It is for the applicant to satisfy the court that there is sufficient cause to excuse him from compliance. The court's power to grant relief should not be exercised arbitrarily and upon the mere asking, but with proper judi-

75 Section 92.

cial discretion and upon sufficient and satisfactory grounds being shown by the applicant. In the determination whether sufficient cause has been shown, the basic principle is that the court has a discretion, to be exercised judicially upon a consideration of all facts, and in essence, it is a matter of fairness to both sides in which the court will endeavour to reach a conclusion that will be in the best interests of justice. The factors usually weighed by the court in considering applications for condonation ... include the degree of non-compliance, the explanation for it, the importance of the case, the prospects of success, the respondent's interest in the finality of his judgment, the convenience of the court and the avoidance of unnecessary delay in the administration of justice.⁷⁶

The lower courts have consistently followed this approach by the Supreme Court. For example, in *Chimpondah & Anor v Muvami* 2007 (2) ZLR 326 (H) at 327G-H, Makarau JP said:

The factors generally taken into account by the court when considering an application for condonation are well established. Importantly, but not exclusively, the court takes into account such factors as the length of the delay, the explanation for the delay, the merits of the application and any prejudice to the interests of justice generally.

The exercise of a discretion in respect of condonation can only be interfered with where it is grossly unreasonable, capricious or *mala fide*⁷⁷ In appropriate cases, the sins of legal practitioners are visited on their clients, such as delay in filing heads. Merely changing legal practitioners and having the new legal practitioners blame previous colleagues may not save a party.⁷⁸ Ignorance of the law and of procedures is not an acceptable explanation for a delay.⁷⁹

Appeals from the Labour Court

An appeal from the Labour Court is only permissible on a 'question of

76 At 315 B-D.

77 *ZFC Ltd v Geza* 1998 (1) ZLR 137 (S); *Small Enterprise Development Corporation v David Chemhere* SC 23/2002.

78 *Prize Mahachi v Barclays Bank of Zimbabwe* SC6/2006.

79 *Gift Musiyarira v Rufaro Marketing (Pvt) Ltd* SC96/2005.

law’ and lies to the Supreme Court.⁸⁰ This is elaborated below.⁸¹

High Court

It is the standard approach of almost every legal system to have one court which has ‘full original jurisdiction over all persons and all matters’. Such a court always has jurisdiction unless there is a specific statutory provision taking away or prohibiting jurisdiction. It is a court open to all, over any matter whatsoever. In Zimbabwe, that court is the High Court. Before the enactment of the Constitution of Zimbabwe, 2013 the ‘full original jurisdiction’ of the High Court was conferred by section 13 of the High Court Act, which was a codification of the common law position. The basis of the jurisdiction of such a court is not statute but the common law: it is the court which exists by virtue of the principle of separation of powers. All other courts are said to be creatures of statute and cannot exercise jurisdiction outside that specifically granted by statute.

Given that it was conferred by the High Court Act and the common law, it was permissible for a statute to oust the jurisdiction of the High Court in certain matters, including labour matters.⁸² The Constitution of Zimbabwe, 2013 has fundamentally changed the legal position. The ‘original jurisdiction’ of the High Court over all persons and matters is now a matter of the Constitution. Section 171 (1)(a) provides that:

The High Court – (a) has original jurisdiction over all civil and criminal matters throughout Zimbabwe.

This provision means that it is unconstitutional and therefore invalid to oust the jurisdiction of the High Court in any matter, including labour matters. Where the Constitution or other enactment creates a specialist court, such as the Labour Court, this provision gives the High Court concurrent jurisdiction over those matters allocated to a specialist court.

In *Chiokoyo v Ndlovu & Ors*,⁸³ Uchena J was called upon to determine whether or not section 161(2) of the Electoral Act was consistent with section 171(1)(a) of the Constitution. Section 161(2) of the Electoral Act gave the Electoral Court ‘exclusive jurisdiction’ to hear appeals, applica-

80 Section 92F(1).

81 See elaborations under ‘Supreme Court’.

82 Section 13 of the High Court Act was specific that it was subject to the provisions of any other statute or other law.

83 HH 321/2014.

tions and petitions in terms of the Act and to review any decisions made under the Act. The applicant sought an order preventing the Electoral Commission from allowing voters to take part in a by-election simply on the basis of their voters' registration slips. It was argued, on behalf of the Electoral Commission, that the High Court had no jurisdiction because of section 161(2) of the Electoral Act. Uchena J accepted the argument and dismissed the application. He held that the High Court's original jurisdiction in terms of section 171(1)(a) of the Constitution can be lawfully taken away and given to another court of competent jurisdiction. Accordingly, the Electoral Court's exclusive jurisdiction meant that the High Court had no jurisdiction in the matters allocated to the Electoral Court. This is plainly wrong.

The Legislature cannot take away the High Court's original jurisdiction and allocate it to another court. This arises from basic constitutional principles – there is nothing in section 171(1)(a) to allow diminution of the jurisdiction of the High Court. At most, the Legislature may create a court with concurrent jurisdiction.

No court, other than the High Court, can now have exclusive jurisdiction over any matter. The High Court will always have concurrent jurisdiction in those matters over which other courts have jurisdiction. This means that section 89(6) of the Labour Act must be read as excluding all other courts except the High Court.

It is not permissible for the Legislature to create causes of action and remedies which are only actionable or available, as the case may be, in a court other than the High Court. The Legislature must leave room for the concurrent jurisdiction of the High Court. However, the High Court itself, in the exercise of its inherent jurisdiction to control its process and prevent abuse of its jurisdiction, has a discretion to decline jurisdiction in appropriate circumstances. Thus, the only focus must be on the legal principles which determine whether or not the High Court may exercise jurisdiction in labour matters. Two scenarios arise in jurisdictional issues involving the High Court, and indicate the nature and extent of the High Court's concurrent jurisdiction.

Firstly, where a labour dispute has already been dealt with by one level of the machinery established by the Act, is it permissible for a dissatisfied party to the dispute; to take the matter out of the system established by the Act and approach the High Court for redress, instead of pursuing the

remedies in the Act? Second, are parties to a labour dispute free not to use the machinery in the Labour Act at all and directly approach the High Court instead?

The first scenario

The first question is essentially an issue of whether or not a party who has already initiated proceedings in terms of the Labour Act, is obliged to exhaust the remedies in that Act before approaching the High Court. One situation is where a party who is dissatisfied with a decision of a labour officer in terms of sections 93 and 98 of the Act, seeks to approach the High Court for review of the decision, instead of exercising the right given by section 89(1)(a) of the Act to apply for a review in the Labour Court. Another situation is where a party takes a decision of a disciplinary committee established by a code of conduct for review in the High Court instead of appealing to, or seeking a review in the Labour Court.

The first case on this jurisdictional conflict, albeit under the old law, seems to be *Art Printers Ltd v The Regional Hearing Officer & Joaquim Moyana*,⁸⁴ in which the matter had been referred to a labour relations officer who had ordered reinstatement of the employee. This was affirmed on appeal before a Regional Hearing Officer. However, the employer suddenly abandoned the procedures of the Act and sought an order of the High Court setting aside the determinations of the labour officer. The employee raised, *inter alia*, the jurisdiction point arguing that the employer should have pursued his right of appeal to the Labour Relations Board and accordingly that the High Court had no jurisdiction to hear the matter in the circumstances.

Justice Reynolds rejected the employee's argument. The basis of the decision was that the right to seek judicial review of proceedings and decisions of inferior courts, tribunals and administrative authorities was always available unless clearly excluded by statute.⁸⁵ There was no express exclusion of that right in the Labour Relations Act. There was also nothing in the Act to support any contention that the intention of the Legislature had been to exclude judicial review. To arrive at the decision whether or not there was any implied ousting of the review jurisdiction of the High Court, the judge said two considerations were relevant:

- (i) whether the remedies available in the Act were as effective

84 HH 168/1987.

85 At p. 6.

as those on review and

- (ii) whether the irregularities relied on to seek a review could themselves affect or influence the further proceedings under the Act.

On the first consideration, the judge said the facilities provided for appeal in the Act could not provide effective remedies, and on the second, he was of the view that the improprieties complained of 'could readily distort the subsequent proceedings'.⁸⁶ In the result, he held that judicial review had not been excluded by the then Labour Relations Act.

This case influenced subsequent decisions. In *City of Mutare v Ncube & Anor*,⁸⁷ the same judge had earlier exercised review jurisdiction in a matter in which the remedies in the Act had not been exhausted without referring to the aspect of the jurisdictional conflict. The issue had not been raised. In the same year, Mtambanengwe J took a slightly different approach in *Tutani v Minister of Labour & Anor*.⁸⁸ In that case, an employee had taken on review by the High Court a decision of a labour relations officer approving his dismissal from employment in terms of the then SI 371/1985 instead of appealing to the next authority. The judge did not directly address the issue of whether the review jurisdiction of the High Court was still available, notwithstanding the provisions of the Act. He simply noted:

*I have tried to set out the provisions of the Act and the relevant statutory instruments made under it to emphasise the point that domestic remedies are provided which will lead to a proper determination of the matter.*⁸⁹

His conclusion puts his basis beyond doubt:

I also find that the domestic remedies provided by the legislation in question are capable of providing effective redress in respect of the complaint and, secondly, that the unlawfulness alleged has not undermined the domestic remedies themselves...The appeals provided for in the regulations are a rehearing of the matter in the fullest sense of the word.

⁸⁶ At p. 7.

⁸⁷ HH 139/1987.

⁸⁸ 1987 (2) ZLR 88 (H).

⁸⁹ At p. 94A.

Tutani did not make any reference to *Art Printers Ltd v The Regional Hearing Officer*.⁹⁰

Mtambanengwe J then heard the case of *National Foods Ltd v Kare*,⁹¹ which was an application by an employer to review the decision of a regional hearing officer. Counsel for the workers specifically raised the issue of the jurisdiction of the High Court, arguing that since the regulations gave the then Labour Relations Tribunal the powers of review, this meant that the High Court's review jurisdiction had been ousted. In a surprising judicial development, Mtambanengwe J rejected this argument, and, without referring to his own decision in *Tutani v Minister of Labour & Anor*⁹² referred to the decision in *Art Printers* and said, '... the point is settled and I need not dwell on it...' ⁹³ and added 'it is inconceivable that the Legislature would have provided for an ouster of the High Court's jurisdiction by means of subsidiary legislation without expressly saying so'.⁹⁴

In *Kadoma Magnesite (Pvt) Ltd v Acting Regional Hearing Officer & Ors*,⁹⁵ Robinson J was asked to review a determination of a labour relations officer. In another surprising judicial development, the judge proceeded as if there had been no clear previous decisions on the issue. The judge simply referred to the High Court Act, which allows the High Court to continue to exercise its common law review jurisdiction, and after one brief paragraph concluded: 'It accordingly follows that where a labour relations officer has been guilty of an error in law by disregarding the provisions of a statute, the aggrieved party is entitled to bring the matter on review to the High Court.'⁹⁶ The judge showed no sensitivity whatsoever to the jurisdictional conflict between the High Court and 'labour courts' in the then Labour Relations Act.

In *Minister of Labour & Ors v PEN Transport (Pvt) Ltd*,⁹⁷ the Supreme Court dealt with an appeal from the High Court which had reviewed the decision of a labour relations officer. The employer had chosen not to ap-

90 Supra.

91 1990 (1) ZLR 223 (H).

92 Supra.

93 At p. 227.

94 At p. 228.

95 1991 (1) ZLR 283 (H).

96 At p. 285.

97 1989 (1) ZLR 293 (S).

peal to a regional hearing officer. This case could have been an early opportunity for the Supreme Court to clarify the position on the jurisdictional conflict. The judgment did not do so. Gubbay JA (as he then was) had this to say:

If the employer considered that the finding was unreasonable on the 'evidence', as it obviously did, then its remedy lay in the right to appeal against it to a regional hearing officer. Under its inherent right at common law to review the proceedings of inferior courts and tribunals, the High Court does not exercise an appellate jurisdiction. Unless, therefore, the averment was made, which advisedly it was not, that the determination ... was unreasonable to so striking a degree as to be inexplicable except on the assumption of something else, of mala fides or ulterior motive or failure by the labour relations officer to apply his mind to the matter – a formidable onus – any examination by way of judicial review was not open to the employer.⁹⁸

With respect, this judgment left room for judicial review as long as the grounds for review were available, such as gross unreasonableness.

Then came *Musandu v Chairperson of Cresta Lodge Disciplinary and Grievance Committee*,⁹⁹ where Smith J dismissed an application for review holding that:

In my view, this court should not be prepared to review the decision of a domestic tribunal merely because the aggrieved person has decided to apply to court rather than to proceed by way of the domestic remedies provided. The factors mentioned by Mtambanengwe J in Tutani's case, supra, should be carefully considered before a decision is made. A litigant should exhaust his domestic remedies before approaching the courts unless there are good reasons for approaching the court earlier.¹⁰⁰

This case took the view that judicial review of decisions of a Labour court by the High Court was not merely a question of satisfying the requirements for judicial review. There was no room for judicial review

98 At p. 297.

99 HH 115/1994.

100 At p. 7.

before domestic remedies had been exhausted except where there were ‘good reasons’.

After this *Musanda* case and before the Supreme Court pronouncements in *Cargo Carriers (Pvt) Ltd v Zambezi & Ors*¹⁰¹ the position was somewhat unclear. One line of cases suggested that parties had an inherent right to approach the High Court and the latter had no option, except in exceptional cases, but to hear them whether or not domestic remedies had been exhausted.¹⁰² The other line of cases took a directly opposite position, namely that the High Court should not exercise jurisdiction except where good reasons existed.¹⁰³

Both sides acknowledged the jurisdiction of the High Court in certain circumstances to hear labour matters, notwithstanding the fact that domestic remedies had not been exhausted. The difference was one of degree of involvement: whether it should be a readily available jurisdiction or one sparingly exercised. In the *Cargo Carriers* case (*supra*), Gubbay CJ had this to say:

In addressing argument, counsel for the appellant was correct to acknowledge that the principle has been established that an aggrieved party may have locus standi to approach the High Court for relief even though the remedies provided under the Labour Relations Act have not been exhausted.

*In considering the cogency of the submission, what should not be overlooked is that Bartlett J exercised a discretion to hear the matter. That he did so is a significant factor at this stage of the proceedings. Unless it can be found that no reasonable judge would have acted other than to decline jurisdiction ... the decision made is plainly beyond interference by this court. This apart, I am of the view that special features indeed existed.*¹⁰⁴

101 1996 (1) ZLR 613 (S).

102 See for instance *Art Printers v Regional Hearing Officer and Joaquim Moyana* HH 168/1987; *City of Mutare v Ncube & Anor* HH 139/1987; *Kadoma Magnesite (Pvt) Ltd v Acting Regional Hearing Officer* 1991 (1) ZLR 283 (HC).

103 See for instance, *Tulani v Minister of Labour* 1987 (2) ZLR 88 (H); *Musandu v The Chairperson of Cresta Lodge Disciplinary and Grievance Committee* HH 115/1994.

104 At pp. 617H-618B.

The *Cargo Carriers* case became the first authoritative statement by the Supreme Court on the issue of the jurisdiction of the High Court in labour matters where domestic remedies had not been exhausted. That case stands for two propositions of law. Firstly, a party must exhaust domestic remedies before approaching the High Court unless there are special circumstances (or good reasons). In other words, the High Court must decline jurisdiction if domestic remedies have not been exhausted unless there are special circumstances warranting the exercise of jurisdiction. Secondly, whether or not special circumstances exist is a question entirely in the discretion of the judge. The judge must weigh all factors with an open mind and make a decision based on what is reasonable: is it reasonable in the circumstances to exercise jurisdiction notwithstanding the non-exhaustion of domestic remedies? The judge's conclusion in this regard will only be set aside on appeal if it is grossly unreasonable.

The Supreme Court sealed this position of the law in *Girjac Services (Pvt) Ltd v Mudzingwa*.¹⁰⁵

It is submitted that the law is as follows: a party should exhaust the domestic remedies provided in the Labour Act unless there are exceptional reasons for not doing so. The issue becomes one of identifying what are the 'exceptional' or 'good' reasons for abandoning the domestic remedies. One good reason is where the dispute raises a question of law which may dispose of the matter once and for all and thus approaching the High Court earlier would be desirable.

This was followed in *Muzengi v Standard Chartered Bank Zimbabwe Ltd & Anor*,¹⁰⁶ where Ziyambi JA emphasized that in the absence of special circumstances, the obligation to exhaust domestic remedies was 'peremptory'. She said:

No special circumstances or good reason having been shown by the appellant justifying his approach to the High Court, the appellant's obligation to exhaust his domestic remedies was peremptory. Accordingly, the application ought, on this ground alone, to have been dismissed'.¹⁰⁷

The propositions of law made in the *Cargo Carriers*, *Girjac Services*

105 1999 (1) ZLR 243 (S).

106 2002 (1) ZLR 334 (S).

107 At 338C-D.

and *Muzengi* cases (*supra*) appear to be now settled as follows: a party must exhaust domestic remedies provided for in the Labour Act unless there are exceptional reasons for not doing so, in which case a review by the High Court is justifiable. The domestic remedies include a review by the Labour Court. Whether or not the exceptional reasons exist is a question of discretion by the High Court judge. The exercise of that discretion may only be set aside on appeal if it is so outrageous in its defiance of logic or common sense that no reasonable judge could have made that decision.

Although this position is now settled, it has been fiercely contested. In *Zikiti v United Bottlers Ltd*,¹⁰⁸ Gillespie J was firmly of the view that, in general, the High Court should not decline jurisdiction. He preferred the opposite formulation to the position in *Cargo Carriers*: jurisdiction should always be available, even before the exhaustion of domestic remedies, except in very limited cases such as preventing the duplication of proceedings. He based his approach on two grounds. Firstly, the relevant statute did not require the exhaustion of domestic remedies. Secondly, the High Court's common law jurisdiction is not, in principle, ousted by the non-exhaustion of domestic procedures. He expressed himself as follows:

The reluctance to permit access ad libitum where proceedings and recourse are still available in lower tribunals appears inconsistent with the accepted interpretation that the relevant statute does not expressly or by necessary implication require the exhaustion of domestic remedies... One must commence with the finding that the court's common law jurisdiction is not in principle ousted or stayed pending exhaustion of domestic procedures. This proposition is one which is binding and which is, with respect, obviously correct. Whilst the domestic remedies and procedures are exhaustive they patently do not replace the common law remedies for power of review of an earlier irregular decision. The election of an aggrieved person to pursue his common law remedy rather than the very cumbersome and time-consuming statutory procedures is therefore preserved. Similarly, the privilege of a person to seek a review of an improper early decision, so that subsequent decisions are not prejudiced thereby, must

108 1998 (1) ZLR 389 (H).

be upheld.¹⁰⁹

His preferred position of the law was expressed as follows:

*An aggrieved employee has an unfettered election whether to pursue a cause of action arising from employment according to the common law, or through the domestic and statutory procedures appointed. Even where he has chosen, or been compelled, to submit to the domestic procedures, he is not obliged to exhaust those remedies before praying relief from the High Court. Since, however, the courts have recognized that the appeal procedure domestically provided is generally most-efficacious, frequently permitting a full rehearing, the courts discourage a duplication of proceedings unless good cause is shown.*¹¹⁰

The jurisprudential basis for this was that ‘the courts of law are open to all, and it should only be in exceptional circumstances that the doors will be closed upon a litigant’.¹¹¹

In *Communications & Allied Services Workers Union of Zimbabwe v Tel-One (Pvt) Ltd*,¹¹² Makarau J (as she then was) followed Gillespie J and said:

In Zikiti v United Bottlers 1998 (1) ZLR 389 (H), Gillespie J explained in detail and in a manner that appeals to me the rationale behind the reluctance of the courts to allow access ad libitum where proceedings and recourse are still available in the lower courts... Instead of the availability of domestic remedies being held as a complete bar to the bringing of proceedings before this court, it is used as a measure to select the instances where the court will withhold its jurisdiction pending the exhaustion of domestic remedies. The position regarding the need to exhaust domestic remedies thus presents itself to me: this court always enjoys jurisdiction to determine matters placed before it even where domestic remedies have not been exhausted but, this court, in its dis-

109 At 392D-393A.

110 At 394 B-C.

111 At 394B.

112 2005 (2) ZLR 280 (H).

*cretion, will sometimes withhold that jurisdiction to allow the domestic remedies to expend themselves.*¹¹³

As already noted, this approach is conceptually different from the one in *Cargo Carriers*. In terms of Gillespie's and Makarau's approach, jurisdiction is always available unless exceptional circumstances exist. In the *Cargo Carriers* approach, jurisdiction is declined unless exceptional circumstances exist. In both, 'exceptional circumstances' serve opposite purposes: in the Gillespie/Makarau situation, it is to decline jurisdiction while in *Cargo Carriers*, it is to exercise jurisdiction.

Be that as it may, discussing the Gillespie/Makarau approach is not academic given section 171(1)(a) of the Constitution. It may turn out to be the more appropriate approach to the concurrent jurisdiction of the High Court. Whichever approach is adopted, the most common observation is that where the domestic remedies provide an effective redress of the issues raised, the courts will hold that no exceptional circumstances exist.¹¹⁴ Conversely, if the domestic remedies are inadequate, this fact alone qualifies as exceptional circumstances. Thus in *Moyo v Forestry Commission*,¹¹⁵ Malaba J (as he then was) stated:

*A court will not insist on the applicant first exhausting domestic remedies where the appeal system created by the code of conduct does not confer on the aggrieved party better and cheaper benefits than its remedies or where the decision to be appealed against undermined the domestic remedies themselves, for example where the tribunal had no power to make the decision in question.*¹¹⁶

The second scenario

The second question is whether or not parties to a labour dispute are free not to use the machinery in the Labour Act and to approach the High Court instead. The answer to this question is clear: in view of section 171(1)(a) of the Constitution, the jurisdiction of the High Court is avail-

113 At 286E-G.

114 See *Tutani v Minister of Labour & Ors* 1987 (2) ZLR 88 (H) at 95D; *Girjac Services*; *Muzengi v Standard Chartered Bank Zimbabwe Ltd* (supra); *Moyo v Gwindingwi NO & Anor* 2011 (2) ZLR 368 (H).

115 1996 (1) ZLR 173 (H).

116 At 192C; see also *Cargo Carriers* (supra).

able in the circumstances.

Before the enactment of the Constitution of Zimbabwe, 2013 this second scenario arose in *Ntini v Jongwe Printing & Publishing Co.*,¹¹⁷ in which a worker simply approached the High Court on a termination of employment dispute without resorting to the machinery in the then Labour Relations Act. Greenland J held that the High Court had jurisdiction to hear the matter since the parties were not obliged to use the system in the Act. The Act used the word ‘may’ and this meant that parties had a choice as to which court to approach. Although this case was not referred to in *F. D. Arian & Co (Pvt) Ltd v Tsodzo & Anor*,¹¹⁸ the Supreme Court affirmed the same principle that a party may directly approach the High Court without necessarily following the machinery set up in the Act.¹¹⁹

It is settled that where the Labour Court has no jurisdiction, the court with jurisdiction in labour matters is the High Court. As already indicated, this is the case with a declaratory order, an interdict and a *mandamus*. An employer seeking to recover or repossess its assets, such as a motor vehicle, from a dismissed employee uses the *rei vindicatio*. Where there is no dispute between the parties regarding the termination of the employment contract, the *rei vindicatio* is only actionable in the High Court.¹²⁰ It is also trite that the Labour Court cannot award delictual damages even when they arise from the employer-employee relationship.¹²¹

If the cause of action in a labour matter is founded on the constitutional invalidity of any law, the Labour Court has no jurisdiction and the port of call is the High Court.

In principle, the High Court may review proceedings of the Labour Court.¹²² The High Court is a superior court and there is nothing in the Labour Act to suggest that proceedings of the Labour Court are immune from review.

117 HH 623/1987.

118 1993 (1) ZLR 50 (S).

119 See also *Fisher and Ors v Air Zimbabwe Corp* HH 306/1998.

120 *Medical Investments Ltd v Pedzisayi* 2010 (1) ZLR 111 (H).

121 *Gwaze v National Railways of Zimbabwe* 2002 (1) ZLR 679 (S).

122 See generally *Zimbabwe Newspapers (1980) Ltd Workers' Committee & Ors v Honourable Musariri, the Labour Court & Zimbabwe Newspapers (1980) Ltd* SC78/2006.

Supreme Court

The Supreme Court has appellate jurisdiction over labour matters when it considers on appeal from the Labour Court or the High Court. Appeals from the Labour Court are only on ‘a question of law’. There is no automatic right of appeal. A party seeking to appeal must obtain leave in terms of section 92F from the judge or judges of the Labour Court who made the decision being appealed against. By necessary implication, if the judge who made the decision is unavailable, leave to appeal in terms of section 92F may be sought from any judge of the Labour Court.

If leave is refused by a judge or judges of the Labour Court, leave may be sought from a judge of the Supreme Court. An appeal noted to the Supreme Court before the granting of leave to appeal in terms of section 92F is a nullity.¹²³ In an application for leave to appeal, two issues must be considered: (i) whether the grounds of appeal raise questions of law, and (ii) the prospects of success.¹²⁴ One of the grounds which may be relevant for the grant of leave to appeal is the importance of the point of law raised in the grounds of appeal. If the point of law is of such importance that an opportunity be allowed for it to be argued on appeal, leave to appeal must be granted.¹²⁵

The meaning of the expression ‘question of law’ was considered by the Supreme Court in *Muzuva v United Bottlers (Pvt) Ltd*.¹²⁶ Gubbay CJ referred to the South African case of *Media Workers’ Association of South Africa & Ors v Press Corp. of South Africa Ltd* (‘Perskor’)¹²⁷ and adopted the three senses in which the expression is used:

First, it means a question which the law itself has authoritatively answered to the exclusion of the right of the court to answer the question as it thinks fit in accordance with what is considered to be the truth and justice of the matter. Second, it means a question as to what the law is. Thus, an appeal on a question of law means an appeal in which the question for argument and determination is what the true rule of law is on a certain matter. And third, any question which is within the

123 *Sheckem Ngazimbi v Murowa Diamonds (Pvt) Ltd* SC27/2013.

124 *Ibid.* p. 4.

125 *Zimnat Life Assurance Ltd v Dikunye* 2008 (2) ZLR 200 (S) at 202D.

126 1994 (1) ZLR 217 (S).

127 1992 (4) SA 791 (A).

province of the judge instead of the jury is called a question of law.

I respectively adopt this classification, although the third sense is of no relevance to a matter such as this.

In terms of this approach, the expression ‘question of law’ is taken to mean either of the two senses in the above quotation.¹²⁸ In many cases, it is easy to determine whether or not a ‘question of law’ arises in the first or second sense. The courts have expanded the scope of ‘question of law’ in the first sense. Under the expanded scope, a ‘question of law’ still arises even in cases where the court has considered matters of fact. If there is a serious misdirection on the facts, it is taken to be a misdirection in law, thus raising a ‘question of law’.

In *National Foods Ltd v Magadza*,¹²⁹ Ebrahim JA said:

*It is true that this court only has jurisdiction to hear an appeal from the Tribunal on a point of law. But clearly if there is a serious misdirection on the facts, it amounts to a misdirection in law. The giving of reasons that are bad in law constitutes a failure to hear and determine according to law.*¹³⁰

In *Hama v National Railways of Zimbabwe*,¹³¹ the Supreme Court went further to hold that for a misdirection on the facts to amount to a misdirection of law, it must be ‘irrational’.¹³² Korsah JA formulated the test in the following words:

The general rule of the law, as regards irrationality, is that an appellate court will not interfere with the decision of a trial court based purely on a finding of fact unless it is satisfied that, having regard to the evidence placed before the trial court, the finding complained of is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be

128 See also *Mpumela v Berger Paints (Pvt) Ltd* 1999 (2) ZLR 146 (S) at 149A-D.

129 S 105/1995.

130 See also *Bank of Credit & Commerce Zimbabwe Ltd v Shepherd Chigwada* S 116/1995.

131 1996 (1) ZLR 64 (S).

132 At 670B.

*decided could have arrived at such conclusion.*¹³³

When a judgment of the Labour Court is granted by consent, there is no question of law and therefore no appeal is available against it.¹³⁴ This is because no question of fact or law would have been the subject of the decision by the Labour Court.¹³⁵

Examples of ‘question of law’ and ‘question of fact’ may be useful. Whether or not a document signed is a legal document is a question of law.¹³⁶ Whether or not a disciplinary committee is improperly constituted is a question of fact.¹³⁷ The question whether or not an employee has waived his or her rights is a question of fact.¹³⁸ The quantum of damages payable for an unlawful dismissal is a question of fact.¹³⁹ While the quantum of damages is a matter of fact, to quantify on no evidence is to err in law, thus raising a question of law.¹⁴⁰ Whether or not an employer has capacity to pay salaries imposed by an award is a question of fact.¹⁴¹

A misdirection of fact is either a failure to appreciate a fact at all or a finding of fact that is contrary to the evidence actually presented.¹⁴² An example of a finding of fact which is so outrageous in its defiance of logic that no sensible person who had applied his or her mind to the question would have made such a finding was in *Mutsuta & Anor v Cagar (Pvt) Ltd*.¹⁴³ The two employees were employed as managers in a shopping centre. The shop was guarded by security guards employed by another company. The keys for the shop and safe were kept by the two employ-

133 At 670 C-D. For ‘question of law’ see also *Mbisva v Rainbow Tourism Group Ltd* 2009 (2) ZLR 342 (S); *Sable Chemical Industries Ltd v Easterbrook* 2010 (2) ZLR 342 (S); *Mutsuta & Anor v Cagar (Pvt) Ltd* 2009 (2) ZLR 327 (S); *TM Supermarket v Mangwiro* 2004 (1) ZLR 180 (S).

134 *Chawatama v United Touring Co* 2004 (2) ZLR 268 (S).

135 *Ibid.*

136 *Mbisva v Rainbow Tourism Group* 2009 (2) ZLR 33 (S).

137 *Sable Chemical (supra)*.

138 *Ibid.*

139 Chapter 9.

140 *Rutiri v Heritage Clothing (Pvt) Ltd* 1994 (2) ZLR 374 at 380B-F; *Farm Community Trust v Claudious Chemhere* SC 22/2013 at 7.

141 *Midlands State University Council v Midlands State University Lecturers* 2005 (2) ZLR 213 (S) at 221.

142 See *Mutsuta & Anor v Cagar (Pvt) Ltd* 2009(2) ZLR 327 (S).

143 2009 (2) ZLR 327 (S).

ees. The external doors of the shop and the safe could only be opened when both were present because each had a different key. On one of the days, the safe was found open and the money that was in it was missing. They were charged with theft and were found guilty and dismissed. The Labour Court accepted the guilty verdict on the basis that the ‘employees were the sole custodians of the keys to the premises’. This finding was made, despite the uncontested fact that spare keys for the shop and safe were kept at the company’s head office. The Supreme Court held that this finding met the test of being outrageous in its defiance of logic. This was because it ignored the facts available. The finding of guilty was set aside and the employer was ordered to reinstate the employees or pay them damages in lieu of reinstatement.

The general rule is that it is highly irregular and unfair for an appellate court to assume the jurisdiction of a court of first instance and to pronounce on issues which are properly cognizable in a court of first instance but have not been canvassed before that court.¹⁴⁴ In the *Magodora* case, the employees, on appeal, were seeking an order declaring them either permanent employees or employees on a new fixed contract of nine months. Before the arbitrator, the employees had alleged an unlawful retrenchment and had sought an order that the matter be referred to the Retrenchment Board. In their appeal in the Labour Court, the employees challenged the arbitrator’s decision refusing reference of the matters to the Retrenchment Board. Patel JA said:

It is abundantly clear, therefore, that the appellants’ case did not involve any claim for permanent employment status or re-employment. In essence, the relief that they pray for on appeal to this court is completely different from what they sought hitherto. In this respect, the appellants are effectively inviting this court to sit as a court of first instance and to adjudicate a matter that was not ventilated before or determined by the Labour Court.

In casu, the merits of the primary relief sought by the appellants were never debated or considered by the court a quo

144 See *Kundai Magodora & Ors v Care International Zimbabwe* SC24/2014; *ANZ Grindlays Bank (Zimbabwe) (Pvt) Ltd v Hungwe* 1994 (2) ZLR 1 (S) at 5A-B; *Total Marketing Zimbabwe (Pvt) Ltd v Pollylamp Investment (Pvt) Ltd* 2007 (2) ZLR 60 (S) at 62G.

and, consequently, they cannot be entertained or determined by this court. In other words, the court has no remit to exceed its jurisdiction and powers on appeal.

Appeals to the Supreme Court require a valid notice of appeal. There are two main ways in which a notice of appeal may be invalid: failure to comply with the Act, and non-compliance with the rules of court. Where a notice of appeal is invalid by reason of non-compliance with the Act, it is a nullity and is incurably defective. The court has no discretion in the matter. On the other hand, where it is invalid for non-compliance with the rules of court, the court has a discretion and may condone the non-compliance and allow the defect to be cured.¹⁴⁵

An appeal from the Labour Court to the Supreme Court suspends the decision appealed against.¹⁴⁶ When an appeal is made to the Supreme Court against a decision of the Labour Court, the noting of the appeal suspends both the Labour Court and the arbitrator's decisions.¹⁴⁷ The Labour Court has no jurisdiction to grant leave to execute despite the noting of the appeal. Only the Supreme Court, exercising its inherent jurisdiction to control its process, may order execution of a judgment pending the hearing of the appeal.¹⁴⁸

In exercising its jurisdiction as an appeal court, the Supreme Court will remit to the Labour Court for a consideration on the merits where it upholds an appeal based on procedural irregularities. However, the Supreme Court does not always remit matters to the Labour Court to decide on the merits. It may determine the matter on the merits if it would be just and equitable for it to do so, provided all the relevant facts are at its disposal. This is exceptional and is restricted to matters where finality would be extremely desirable.¹⁴⁹ It may not be necessary to remit where the issues are obvious, such as where the employee's guilt is admitted.¹⁵⁰ Also, there is no remitting where it would cause further delays and there

145 *Church of the Province of Central Africa v Kunonga & Anor* 2008 (1) ZLR 413 (S) at 418; *Shekem Ngazimbi v Murowa Diamonds* SC 27/2013 at 4-5.

146 *Kingdom Bank Workers Committee v Kingdom Bank Financial Holdings* 2012 (1) ZLR 93 (H).

147 *NetOne Cellular (Pvt) Ltd v Net One Employees & Anor* 2005 (1) ZLR 275 (S).

148 *Ibid.*

149 See for example *City of Mutare v Samupindi* 2006 (2) ZLR 176 (S).

150 *Ibid.*

is sufficient information on the record.¹⁵¹

Constitutional Court

The Constitutional Court is a specialist court in constitutional matters. It is created in terms of sections 162 and 166 of the Constitution. It is the highest court in all constitutional matters and its decisions on those matters bind all other courts.¹⁵² It has two types of jurisdiction, exclusive and concurrent. Exclusive jurisdiction is where it is the only court with jurisdiction. The matters over which it has exclusive jurisdiction are specified in section 167(2) of the Constitution. These include advising on the constitutionality of any proposed legislation, hearing and determining disputes relating to the election of the President and determining whether Parliament or the President has failed to fulfil a constitutional obligation.

Concurrent jurisdiction is where other courts also have jurisdiction in constitutional matters. At present, the High Court and the Supreme Court also have jurisdiction in constitutional matters. However, where a court, other than the Constitutional Court, makes an order of invalidity of any law, the order has no force unless it is confirmed by the Constitutional Court.¹⁵³

In labour matters, the Constitutional Court has jurisdiction as follows:

- (i) if a constitutional matter arises in any proceedings in the Labour Court, the High Court or Supreme Court or any other court dealing with a labour matter, it may be referred to the Constitutional Court in terms of section 175(4);
- (ii) if the High Court or Supreme Court makes an order of constitutional invalidity of any aspect of labour law, that order requires the confirmation of the Constitutional Court before it has force;¹⁵⁴
- (iii) if on an appeal in a labour matter, the Supreme Court makes a decision on the basis of a legal rule that raises a

151 Ibid. *First Banking Corporation Ltd v Balthazar Marimo* Sc57/2005.

152 Section 167(1)(a).

153 Section 175(1).

154 Ibid.

constitutional matter, a party may take the decision to the Constitutional Court;

- (iv) the development of, or failure to develop, the common law in labour law by the High Court and Supreme Court in terms of section 176 may raise a constitutional matter for the Constitutional Court. This fourth basis may be subsumed under one or other of the above.

CHAPTER 14

DISPUTE SETTLEMENT

3. THE RIGHT TO STRIKE

Introduction

The right of workers to strike is probably the most controversial component of labour law. It raises complex questions. For instance, is the right to strike a human right? Does an individual worker have a right to strike? Should the law create and protect a right to strike? The list of questions could be continued, and their complexity is compounded by the fact that the issue of a right to strike attracts very strong, and sometimes deeply emotive and ideological, views. A leading labour lawyer is often quoted in the following words as an example of these strongly expressed views:

There can be no equilibrium in industrial relations without a freedom to strike. In protecting that freedom, the law protects the legitimate expectations of workers that they can make use of their collective power: it corresponds to the protection of the legitimate expectations of management that it can use the right of property for the same purpose on its side....¹

Such comments are not restricted to academics. Even judges have had occasion to strongly defend the right of workers to strike. The celebrated English judge, Lord Wright, noted:

1 Per Kahn Freund, quoted in Davies and Freedland (1983), p. 292.

The right of workmen to strike is an essential element in the principle of collective bargaining.²

A Canadian judge was even more forthright:

... the freedom to bargain collectively, of which the right to withdraw services is an integral aspect, lies at the very heart of the existence of an association of workers. To remove their freedom to withhold their labour would be to sterilize their association.³

Yet, notwithstanding these strong sentiments in support of the right to strike, workers the world over seem to share a common feature: the right to strike is not meaningfully available to them whatever the claims to the contrary. With few exceptions, strikes are either completely outlawed or severely restricted. This chapter seeks to examine strike law in Zimbabwe in the light of international labour standards and principles of labour law. It will first explore the philosophical justifications for a right to strike, and then examine both international and Zimbabwean labour law.

Justifications for a right to strike

The debate on the issue of the right to strike seems to be premised on the assumption that it is 'obvious' that there must be recognition of this right in any democratic society.⁴ However, a number of specific justifications have been given to support the entrenchment of a right to strike for workers in any industrial relations system. Firstly, the right to strike has been defended as a fundamental human right.⁵ On this basis, no more justification is required than that applicable to the defence of human rights in general, namely self-evident rights which accrue by virtue of being human.⁶ A right to strike, if seen as a fundamental human right, ought to be part of any civilized community in the same way as the rights to life,

2 *Croftier Harris Tweed v Veitch* [1942] AC 435 at 463.

3 Per Cameron JA, *Re Retail Wholesale Union and Govt of Saskatchewan* (1985) 19 DLR (4th) 609, at 639.

4 Davies and Freedland, *op.cit.*, p. 292, where it is said: 'There must be a freedom to strike... this is obvious.'

5 See Ben-Israel (1988), Chapter 1.

6 See for instance, the opening paragraphs of the American Declaration of Independence (1776) '...we hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights...'

liberty and other common human rights. This justification seems to have been largely resisted. It has been said that ‘there has been reluctance to describe the freedom to strike as a right because of a strike’s coercive nature and delictual consequences; no other human right exists for the explicit purpose of forcing others to do what they do not want to do’.⁷ Be that as it may, the characterisation of a right to strike as a human right is one of the justifications given for insisting on its universal recognition.

Secondly, the right to strike has been justified on the grounds of democracy, it being argued that such a right is ‘intrinsic to the notion of democracy, a view reinforced by the fact that, conversely, it is often banned in totalitarian societies’.⁸

Thirdly, justification of the right to strike has been described as the ‘equilibrium’ argument⁹ and is heavily rooted in the concepts that underlie labour law. It is the notion that the withdrawal of labour acts as the only effective countervailing force to the power of capital (management) to hire and fire. The right to strike is thus seen as creating an ‘equilibrium’ in labour relations.¹⁰ This equilibrium is seen as essential for the establishment of a properly functioning industrial relations system. Of particular note is the fact that this justification does not see the ‘equilibrium’ as an end in itself. The equilibrium is seen as a means to facilitating collective bargaining, the latter being taken as the cornerstone of modern labour law. Put differently, according to this justification, the basic principle of modern labour law should be to promote collective bargaining as a means to resolving the inherent conflict between labour and capital, while at the same time preserving an efficient capitalist system. Collective bargaining cannot work without workers having a right to strike. The strike is ‘the sanction that impels the parties to bargain collectively’.¹¹ This narrow concept of a right to strike appears to be the most widely accepted and explains the law of strikes in the United Kingdom and a number of other European countries.¹² The justification given to support the existence and/or protection of the right to strike largely shapes the nature and extent of protection given by law. For instance, the ‘equilibrium’

7 Rycroft and Jordaan (1992), pp. 271-2.

8 Deakin and Morris (1995), p. 752.

9 Ibid..

10 See Kahn Freund’s statement, *op. cit.*, f/n 1.

11 Brassey et al. (1987), p. 243.

12 See generally Wedderburn (1991), pp. 276-353

argument makes purely political strikes illegal in the United Kingdom and the United States, as these are not functional to collective bargaining.¹³ In the 1993 Interim South African Constitution the right to strike was specifically 'for the purpose of collective bargaining'.¹⁴ In Germany, the position has been put more forcefully as follows:

*The aim of strikes must be the conclusion of a collective agreement. If they are called to achieve goals that cannot be covered in a collective agreement, they are illegal. This applies particularly to political or demonstration strikes...*¹⁵

On the other hand, in Italy, where the Constitution grants a right to strike on the justification of fundamental human rights, some political strikes are lawful.¹⁶

The justification given in defence of the right to strike not only helps in understanding the law but also in shaping and developing it. The justifications for Zimbabwe's strike law are unclear. In many instances, the law on strikes is contradictory. To streamline the law of strikes in Zimbabwe, it will be essential to provide a clear justification for the right to strike and thereafter develop it in a systematic fashion.

The right to strike in international labour law

There is no ILO convention dealing specifically with the right to strike. The more obvious candidates – ILO Conventions No 87 (on Freedom of Association and Protection of the Right to Organize) and 98 (on the Right to Organize and Collective Bargaining) – do not make any specific reference to the right to strike. However, the absence of such a reference does not mean that such a right does not exist in international labour law. ILO case law, developed by the Committee of Experts and the Committee on Freedom of Association, has derived the right to strike from the concept of freedom of association as enshrined in Conventions 87 and 98, holding that the right to strike is 'an intrinsic corollary to the right to organize protected by Convention No. 87' and the right to strike is 'a legitimate means...through which workers may promote and defend

13 Brassey et al., op. cit., pp. 241-50.

14 Section 27 (4) of the Interim South African Constitution.

15 See Halbach et al. (1992), p. 308, paragraph 125.

16 See R.Birk, 'Industrial Conflict: The Law of Strikes and Lock-outs' in Blainpain and Engels (1993) p. 401.

their economic and social interests'.¹⁷

However, ILO jurisprudence has also made it clear that this right is not absolute, and certain restrictions have been admitted. Two of these are in respect of the Public Service and essential services. As regards the Public Service, the ILO has admitted prohibition of the right to strike only to public servants 'acting in their capacity as agents of the public authority'¹⁸ and this should only cover top civil servants. In respect of 'essential services',¹⁹ the ILO accepts that strikes may be prohibited or restricted in them. It defines 'essential services' as those 'interruptions of which would endanger the life, personal safety or health of the whole or part of the population'.²⁰ Whenever the right to strike is prohibited or restricted in these categories, the ILO insists on the provision of compensatory mechanisms such as the reference of disputes to compulsory arbitration.²¹

Apart from ILO jurisprudence, the right to strike is recognized in other international instruments. It is guaranteed in the International Covenant on Economic, Social and Cultural Rights (1966) provided it is exercised in conformity with the laws of the particular country.²² The European Social Charter of 1961 recognizes 'the right of workers and employers to collective action in cases of conflict of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into'.²³ The European Community Social Charter of 1989 provides that 'the right to resort to collective action...shall include the right to strike'.²⁴ Given ILO jurisprudence which has derived a right to strike from the very essence of freedom of association, it is arguable that many other international instruments' protection of freedom of association impliedly cover a right to strike. Although the effect of this

17 Freedom of Association Digest, paras 362 and 363; ILO General Survey by Committee of Experts, 1983 para 200; ILO General Survey, 1994, p. 148. See also Ben-Israel (1988) pp. 64-70, and N. Valticos, 'International Labour Law' in Blanpain and Engels (1993); ILO (1994) p. 136.

18 Freedom of Association Digest, para 393.

19 Ibid., para 394

20 Ibid paras 394 and 400; General Survey 1983 para 214.

21 ILO: Official Bulletin Vol. LXXVI, 1993, series B, No. 1, Case No. 1620 (Colombia).

22 Article 8.

23 Article 6.

24 Article 13.

argument is uncertain, it would cover the African Charter on Human and People's Rights,²⁵ the European Convention for the Protection of Human Rights and Fundamental Freedoms,²⁶ the International Covenant on Civil and Political Rights,²⁷ and the American Convention on Human Rights.²⁸

Strike law in Zimbabwe

Constitutional protection of the right to strike: Constitution of Zimbabwe, 1980

If a right to strike is derived from the Constitution, any purported prohibition or restriction of it in labour legislation is void. The Constitution of Zimbabwe, 1980 did not specifically incorporate a right to strike, but it provided for the freedoms of association and of assembly in section 21(1):

Except with his own consent or by way of discipline, no person shall be hindered in his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to political parties or trade unions or other associations for the protection of his interests.

What was the exact content of a freedom to 'form and belong to trade unions ... for the protection of his interests'? Put differently, what right or freedom is there to belong to a trade union if it has no right to strike?

In one view, the freedom to join and participate in trade union activities necessarily included the right to strike. There were two sources of support for this view. The first was the ILO jurisprudence already referred to. The second came from the Canadian case of *Re Retail Wholesale Union and Govt. of Saskatchewan*,²⁹ which held that provincial legislation banning collective bargaining and strikes was unconstitutional as it infringed the freedom of association of workers protected by section 2(d) of the Canadian Charter (Constitution). The essence of this decision was that freedom of association was meaningless if the activities of the association were not thereby protected. To remove the right to strike from

25 Article 10 (1).

26 Article 11 (1) and 11 (2).

27 Article 22 (1), (20 and (3).

28 Article 16 (1), (2) and (3).

29 (1985) DLR (4th) 609.

an association of workers was to ‘sterilise their association’,³⁰ thereby denying them the freedom of association.

Although this was an attractive approach, it had been demolished even in Canada itself. The Canadian Supreme Court ruled that the right to strike could not be derived from a mere right to associate as the latter did not only exist for trade unions.³¹ This position followed an earlier common law position adopted by the Privy Council in *Collymore v Attorney General*,³² which held that the right to strike could not be derived merely from freedom of association, since trade unions had other activities apart from strikes and collective bargaining.

The better view is that the Constitution of Zimbabwe, 1980, even on the basis of a broad or purposive or generous interpretation, did not provide for a right to strike.

Constitution of Zimbabwe, 2013

As already noted, section 65 of the Constitution provides for labour rights. In section 65(3), it is provided that:

Except for members of the security services, every employee has the right to participate in collective job action, including the right to strike, sit in, withdraw their labour and to take other similar concerted action, but a law may restrict the exercise of this right in order to maintain essential services.

This provision is badly drafted. It is not clear whether the right to strike is an independent right or merely a form of exercise of another right. A comparison with the formulation in other countries is illuminating. Section 41(2) of the Constitution of Kenya, 2010 says:

Every worker has the right ... to go on strike.

In southern Africa there are good examples of constitutional protections for a right to strike.

In South Africa, section 23 provides as follows:

1. Every worker has the right –

(a) to form and join a trade union;

(b) to participate in the activities and programmes of a

30 Cameron JA, at p. 639.

31 *Alberta Union of Provincial Employees v Attorney-General of Alberta* (1986) referred to in Wedderburn (1986) op. cit. pp. 147-8.

32 [1970] AC 538 (PC).

- trade union; and
- (c) to strike.

The Namibian Constitution provides in Article 21 that:

- (1) All persons shall have the right to
 - (a) withhold their labour without being exposed to criminal penalties.

The Malawian Constitution, however, enshrines the right vaguely, as follows: 'The State shall take measures to ensure the right to withdraw labour'.³³ The full effect of these constitutional provisions remains to be seen. Outside Africa, constitutional entrenchment of the right to strike is not unknown.³⁴

Several aspects arise from section 65(3) of the Constitution.

It is not clear whether the provision refers to one or more constitutional rights. There is a right to participate in collective job action. If the word 'including' is to have any significance, it would appear that there is a right to strike which is embedded in the right to participate in collective job action. In other words, the right to strike is not an independent right but merely one of the manifestations of the right to participate in collective job action. The other manifestations include the 'right to sit in' and 'the right to withdraw their labour'. Although this provision is a victim of poor drafting, the intentions of the framers are clear, and the better approach is to regard it, in the light of the standard approach in many constitutions, as providing at its core as follows:

Except for members of the security services, every employee has the right to strike.

This formulation accommodates all the intentions. For example, the inclusion of 'but a law may restrict the exercise of this right in order to maintain essential services' is superfluous. This is adequately accommodated by the limitation clause in section 86. Further, the right to 'withdraw their labour' is not separate from a right to strike.

The right to strike, like most other fundamental rights discussed in Chapter 4, is not absolute. It is subject to limitations under section 86 'in terms of a law of general application and to the extent that the limitation

³³ Section 31 (4).

³⁴ For instance, the right to strike is constitutionally entrenched in Italy, France, Spain, Portugal and Greece. See R. Birk, *op. cit.*, p. 409.

is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom...’

The Labour Act is one such law of general application which places limits on the right to strike. It is misleading to attempt to provide a comprehensive exposition of the constitutional right to strike. Focus must be on assessing each of these limitations with a view to determining whether or not it passes the constitutionality test. Whether or not the limitations placed by the Labour Act on the right to strike pass the constitutionality test is a matter to be discussed in the appropriate sections of this chapter below.

Some legal points arise directly from the constitutional protection.

Firstly, the right to strike is an individual right but it can only be exercised collectively. There is no such thing as a strike by one employee. Herein lies the significance of the formulation in section 65(3) which puts a right to strike as a manifestation of the right to participate in collective job action.

Secondly, the right to strike in section 65(3) is only available for employee-employer related issues. This is the significance of the ‘job’ in ‘collective job action’. Purely political strikes or actions focusing on socio-economic issues over which an employer has no control are not covered by the right to strike in section 65(3). In other words, section 65(3) is not a basis for the so-called ‘stay-aways’.

Thirdly, the constitutional right to strike is for the ‘employee’ and not the trade union. Trade unions derive the right to strike from their members who are employees. This means that employees have a constitutional right to strike, whether or not they are organized by a registered or unregistered trade union. Legislation restricting the right to organize strikes to registered trade unions has to satisfy the limitation clause in section 86.

Fourthly, this is an unqualified right to strike in the sense that it is not restricted to collective bargaining. An example of a qualified right to strike was in the 1993 Interim Constitution of South Africa, which provided in section 27(4) that:

Workers shall have the right to strike for the purpose of collective bargaining.

Linking the right to strike to collective bargaining has been called the organic theory, whereby strikes are only justifiable for purposes of

maintaining an equilibrium in labour relations. It is contrasted with the individualistic theory, which considers the right to strike as belonging to the individual worker even though it is exercised collectively.³⁵ The German approach has been leading in support of the organic theory. It has been said of the position in Germany:

*The strike is generally recognized as the form of collective action guaranteed under collective-agreement autonomy. If the parties to a collective agreement are unable to agree on a new one, even after going to voluntary or state arbitration, the trade union has the strike available to it as a form of industrial action to coerce the employers' side to conclude a new agreement.*³⁶

Fifthly, a lock-out is not protected as a constitutional right. The issue of whether or not the right to lock-out should receive the same protection as the right to strike dominated debate during the constitution-making process in South Africa and was aptly summarized as follows by the South African Constitutional Court:

*A related argument was that the principle of equality requires that, if the right to strike is included ... so should the right to lock-out be included. This argument is based on the proposition that the right of employers to lock-out is the necessary equivalent to the right of workers to strike and that, therefore, in order to treat workers and employers equally, both should be recognised ...*³⁷

The court disagreed and held that the two rights were not equivalent.

The right to strike for State employees

Before the Constitution of Zimbabwe, 2013 the absence of a constitutionally protected right to strike meant that there was no right to strike for State employees, as none of the various statutes governing them had provision for a right to strike. In the police force, resort to a strike constituted several offences such as desertion, insubordination or 'being

35 See Madhuku (1997).

36 Halbach (1992), p. 304

37 *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the RSA*, 1996 (1996) 17 ILJ 821 (CC) at 841.

absent without leave'.³⁸ These offences led to imprisonment of up to five years. More serious offences were created for the army.³⁹ Thus, outside the 'Public Service' group of Government workers, the question of a right to strike was a non-issue – the law made a strike unthinkable. It may be remarked that a blanket prohibition of the right to strike in the police and army is permitted by ILO standards given that Convention 87, upon which the right is founded, does not apply to the police and the army.

In the 'Public Service', the absence of a statutory right to strike effectively meant that there was a blanket prohibition of strikes regardless of the nature of the job or its scope in relation to the exercise of governmental authority. What mattered was whether or not the employee fell into the 'Public Service' as defined by the Public Service Act.⁴⁰ If one was covered by the definition, *cadit quaestio*, there was no right to strike.

As already indicated, such a blanket prohibition of strikes in the entire Public Service was contrary to international labour law. ILO jurisprudence has only allowed prohibitions in those cases where the public servants either exercise governmental authority or are in an 'essential service'. Only top civil servants can be said to exercise governmental authority, and a substantial number of civil servants are not 'essential services' for the purposes of strike law.

It is difficult to understand why the law took this draconian approach to strikes in the Public Service. It is perhaps instructive to note that labour relations in the Public Service in Zimbabwe have always been characterized by a heavy-handed approach. Thus, while public servants could join workers' organizations of their choice, the organizations had no entitlement to be recognized by Government as worker representatives. There was no scope for the registration and recognition of trade unions in the Public Service. The Public Service Act left it to the Minister to recognize an organization of workers at his or her sole discretion.⁴¹ The only reason for the recognition of an organization of workers was for the purpose of 'consultations'.⁴²

The law seemed to be based on a misconception. It was based on the

38 Section 29 (read with the Schedule) of the Police Act.

39 Defence Act, First Schedule.

40 Section 14.

41 Section 24.

42 Section 20.

thesis that the State as an employer cannot be subjected to the same pressure as private employers. In terms of this thesis, the executive arm of Government, even as an employer, is said to be 'answerable only to the Legislature and its right to act unilaterally should not be challenged or trammelled by particular interest groups such as trade unions'.⁴³ Further, public servants have been seen as representatives of sovereign power⁴⁴ and cannot therefore, through a strike, be in conflict with themselves.

The absence of a right to strike clearly meant that failure to report for work in pursuance of a strike objective amounted to a breach of contract under the common law.⁴⁵ However, Government, being a public authority, could not just exercise the common law power to dismiss strikers summarily without following the principles of natural justice. Thus in *Zimbabwe Teachers' Association & Ors v Minister of Education & Culture*,⁴⁶ the Government's purported mass dismissal of striking teachers who had defied its order to return to work was held by the High Court to be unlawful. The basis of the decision was that Government had breached the *audi alteram partem* rule in not giving each teacher an opportunity to be heard, before being fired. It was held further that talking to the worker organizations was not the same as talking to each teacher.

State employees now have a right to strike in terms of section 65(3) of the Constitution.⁴⁷

The right to strike under the Labour Act

The legislation governing labour law outside Government employment is the Labour Act.

The Labour Act provides for a right to resort to industrial action in a manner wider than merely providing for a right to strike. The relevant provision is section 104 (1) reads:

Subject to this Act, all employees, workers committees and trade unions shall have the right to resort to collective job action to redress disputes of interest.

'Collective job action' is defined in section 2 as:

43 Morris and Freedman (1993), p. 115.

44 Ibid. p. 117

45 *R v Smit* 1955 (1) SA 239 ©; *NTE Ltd v SACWU* 1990 (2) SA 499 (N); *NUMSA v Vetsak Co-operative Ltd* (1991) 12 ILJ 564 (LAC).

46 1990 (2) ZLR 48 (H).

47 Chapter 15.

an industrial action calculated to persuade or cause a party to an employment relationship to accede to a demand related to employment, and includes a strike, boycott, lock-out, sit-in and sit-out, or such concerted action.

A strike is thus merely one of many forms of industrial action purportedly protected. This makes any attempt at defining what exactly constitutes a strike largely academic, as almost every form of industrial action is covered by the definition of ‘collective job action’. In other countries, the definition of a ‘strike’ is significant because it is only the strike which is protected and not other forms of industrial action.⁴⁸ In Zimbabwe, the definition of a strike itself should be regarded as legally immaterial. However, out of abundance of caution, it is suggested that the Act only contemplates a strike as a complete cessation of work to distinguish it from the other forms of industrial action.

In *Rutunga & Ors v Chiredzi Town Council & Anor*,⁴⁹ the employees staged a peaceful demonstration during working hours for a few hours demanding that a senior official be dismissed. Prior to the demonstration, they had written to the employer in the following terms:

Workers are requesting for the stepping down of the A/CEO (Chingoma) from this post, failure to that workers are to go on a peaceful demonstration on 29 May 2000.

It was held that the peaceful demonstration was ‘collective job action’ within the meaning of that term in the Labour Act. It involved a withdrawal of labour and was calculated to persuade the employer to accede to the demand ‘related to employment’ (the dismissal of a senior employee).

There are a number of factors to note which arise from the manner of the formulation of the right to strike as enshrined in section 104(1). Firstly, it is a collective right and not an individual right. The right is granted to ‘employees...’ and not ‘an employee’. As such, an individual worker cannot exercise the right to strike enshrined in the Act. Secondly, unlike in other countries such as Germany and Sweden where a lawful strike can only be organized by a trade union,⁵⁰ the Labour Act recognizes the right to strike even by unorganized workers, as long as they are ‘employees’.

48 See generally, R. Birk, op. cit. f/n 17 p. 405.

49 2003 (1) ZLR 197 (S).

50 Birk, op. cit. p. 404.

Thirdly, a political strike, in the sense of a strike not directed at the employer but at the Government or other public authority for changes to policies or law, is not covered by the Act. This is so because the definition of 'collective job action' requires industrial action to be directed to a party to an employment relationship and that the demand be 'related' to employment. The courts in Zimbabwe are not likely to interpret 'related' in such a way as to cover a political strike directed at labour policies.

Fourthly, sympathy strikes do not appear to be covered. 'A sympathy strike takes place in a workplace other than the one where the dispute exists in an attempt to force an employer to settle the dispute.'⁵¹ The definition of 'collective job action' seems to suggest that 'a party to an employment relationship' is the employees' employer and therefore a strike cannot be directed against any other employer.

Fifthly, the right to strike only exists for the redress of 'disputes of interests'. This means that the right to strike under section 104 is not available for the redress of 'disputes of right'. The distinction between disputes of right and disputes of interest has already been discussed.⁵² This restriction of the right to strike to disputes of interest was introduced by the 2002 amendments. Before those amendments, the right to strike was available for the redress of what were called 'lawful grievances', and this covered every conceivable form of labour dispute. Under the old law, the choice of the word 'grievance', as distinct from 'dispute', was meant to avail the strike weapon to a broader range of disagreements between the employer and its employees.

Restrictions on the right to strike under the Labour Act

There are two circumstances in which the right to strike is available without any restrictions whatsoever. These are specified in section 104(4) and relate to (i) avoiding occupational hazards, and (ii) defending an immediate threat to the existence of a workers' committee or a registered trade union.

Section 104(4) is a stand-alone component. For a strike to be lawful under section 104(4), all that has to be shown is that its provisions have been complied with. Other aspects of section 104 are irrelevant. For example, it is irrelevant whether the dispute involved is one of interest or of right. There is no need to serve notice and it is not a precondition to strike

⁵¹ Ibid., p. 189.

⁵² Chapter 12.

action under this subsection that the dispute be referred to conciliation. A strike ballot is not required. The Supreme Court made this point clear in *First Mutual Life Assurance v Muzivi* (*supra*), as follows:

It is clear from section 104 of the Act that employees are entitled to go on strike without observing any formalities if their action is in defence of an immediate threat to the existence of a workers committee.⁵³

In that case the respondent and other employees of the appellant of the grade of assistant manager and above had formed an ‘interim’ managerial workers’ committee. The employer, through its senior management, reacted by seeking to disqualify some of the managers from membership of the managerial workers’ committee on the basis that they were not ‘managerial employees’ within the contemplation of the Act. A dispute emerged and the employer referred it to a labour relations officer, who in turn referred it to the Labour Relations Tribunal. Pending determination by the Labour Relations Tribunal, the employer embarked on a ‘regrading exercise’ which removed the respondent and other members of the interim managerial workers’ committee from the managerial grade. The effect of this exercise was to dissolve the managerial workers’ committee as all its members were now non-managerial employees. The respondent and other employees went on strike. The strike was held to be lawful, notwithstanding the non-observance of any formalities, as this was ‘in defence of an immediate threat to the existence of a workers’ committee’. Chidyausiku CJ’s summary of the threat to the existence of the relevant workers’ committee is worth reproducing:

I will now turn to the issue of whether the collective job action was in defence of immediate threats to a workers committee. ... This conduct of the appellant is more than a threat to the managerial workers committee. It is an actual and direct attack on the existence of the managerial workers committee. It is quite apparent from this conduct and the subsequent conduct of the appellant that it wished to prevent the formation of the managerial workers committee. It is difficult to imagine a greater and more imminent threat to the managerial workers committee than this. It is quite apparent from the conduct of the appellant through its various officers’ action that they

53 per Chidyausiku CJ at p. 290E.

were determined to eliminate the managerial workers committee and prevent its resuscitation.

The various restrictions on the right to strike are now discussed.

Restriction 1: Conciliation and certificate of no settlement

It is mandatory that a dispute be referred to conciliation before contemplating strike action.⁵⁴ The failure of conciliation must be evidenced by the issuing of a certificate of no settlement in terms of section 93(3).⁵⁵ To overcome this restriction, three requirements must be satisfied, namely (i) reference of the dispute to conciliation, (ii) attempts being made to conciliate the dispute, and (iii) issuing of a certificate of no settlement upon failure of conciliation. Obviously, if a certificate of no settlement is issued before any attempts have been made to conciliate the dispute, the certificate is invalid and the restriction is not overcome.⁵⁶

Restriction 2: Essential services

There is a blanket prohibition against resorting to collective job action for employees engaged in an essential service.⁵⁷ In the 1985 Act, ‘essential service’ was so widely defined that most employees covered by the Labour Act were arguably ‘engaged in an essential service’. This was ridiculous. The 1985 definition was repealed by the 2002 amendments. The current definition is as follows:

‘essential service’ means any service –

- (a) the interruption of which endangers immediately the life, personal safety or health of the whole or any part of the public; and
- (b) that is declared, by notice in the *Gazette* made by the Minister, after consultation with the appropriate advisory council... to be an essential service.⁵⁸

This definition is an adoption of the conception of essential services

54 Section 104(2) (b).

55 Ibid.

56 In several cases, collective job action has been held unlawful on the basis of failure to overcome this restriction; see for example: *Net*One Cellular (Pvt) Ltd v Communications & Allied Services Workers' Union of Zimbabwe* SC/89/2005; *Zimpost (Pvt) Ltd v Communications & Allied Workers' Union* 2009 (1) ZLR 334 (S).

57 Section 104 (3)(a)(i).

58 Section 102.

favoured by ILO jurisprudence.⁵⁹ The two components of this definition must each be satisfied for a service to be called ‘essential service’. Thus a service whose interruption would endanger life, personal safety or health of the whole or any part of the public is not an essential service if it has not been declared as such by notice in the *Gazette* by the Minister. Similarly, if the Minister declares by notice in the *Gazette* that a particular service is an ‘essential service’, that service can only be regarded as ‘essential’ if its interruption would endanger the life, personal safety or health of the whole or any part of the public. It is *ultra vires*, the Act and therefore void, for the Minister to declare as an essential service any service which does not meet the above definition.

The Minister, acting in terms of section 102(b), has declared a long list of services as essential services.⁶⁰ Not all employees in a declared service are regarded as being engaged in an essential service. The formula adopted by the Minister in respect of every service declared as essential is to specify the employees in that service who are regarded as being ‘engaged in an essential service’. Thus, for example, ‘services provided by the fire brigade or any other fire services’ have been declared as essential.⁶¹ The employees in the fire brigade who are regarded as being engaged in an essential service are drivers, control attendants, chief fire officers and assistants, divisional officers and supervisors of fighters and station officers. Any employees in the fire brigade who are outside the specified categories are not engaged in an essential service. The other example of services declared as essential are those relating to ‘the supply and distribution of water’ and the employees specified in this category are pump operators, employees responsible for water treatment, plumbers, electricians and engineers.⁶² It is not necessary to list all the declared essential services and the corresponding category of employees regarded as being engaged in those services. Reference must be made to the relevant statutory instrument. However, for ease of reference, apart from the two services already mentioned, the following are the declared services: veterinary services, services provided by revenue specialists, health services, transport and communication services, electrical services and

59 ILO (1984) p. 16, para 214.

60 See Labour (Declaration of Essential Services) Notice, 2003 (SI 137/2003).

61 Section 2(a) of SI 137/2003.

62 Section 2(b) of SI 137/2003.

services provided by a public broadcaster during a state of disaster.⁶³ The compensatory mechanism for resolving disputes of interest in essential services is compulsory arbitration.⁶⁴

Restriction 3: Dispute of right versus dispute of interest

Section 104(3)(a)(ii) repeats, as a restriction, an aspect that is already well grounded in section 104(1), namely that there is no right to strike if the issue in dispute is a dispute of right.⁶⁵ This aspect has already been discussed.

Restriction 4: If the parties have agreed to refer the dispute to arbitration

Employees cannot lawfully go on strike if there is an agreement with the employer to refer the dispute to arbitration.

The agreement must have been entered into after the dispute had arisen. The provision does not refer to a general agreement anticipating future disputes and preparing to prohibit collective job action in respect of such future disputes. Any such agreement, be it in a collective bargaining agreement or otherwise, is invalid as being contrary to section 104(1). In other words, employees, workers' committees and trade unions cannot waive the right granted by section 104(1). While a collective bargaining agreement containing provisions 'inconsistent' with the Labour Act may not be registered, if it is nonetheless registered, the inconsistent provisions are void.⁶⁶

In prohibiting collective job action, if the parties have agreed to refer the dispute to arbitration, the Act seeks to subject a reference to voluntary arbitration to the same consequences as a reference to compulsory arbitration.⁶⁷

Restriction 5: Registration of the trade union

Section 104(3)(c) repeats the restriction already provided for in section 30(3)(a), namely the prohibition imposed on unregistered trade unions

63 SI 137/2003.

64 Section 93(5)(a).

65 *Zimbabwe Graphical Workers' Union v Federation of Master Printers of Zimbabwe & Anor* 2004 (2) ZLR 103(S)..

66 Section 79(2)(a).

67 The effect of a reference to compulsory arbitration on collective job action is provided for in section 98(11) which says: 'Where the Labour Court or a Labour Officer has referred a dispute to compulsory arbitration, no employee, workers committee, trade union, employer or employers organization shall engage in collective job action in respect of the dispute.'

from recommending or embracing collective job action.

Restriction 6: Approval or authorisation by a registered trade union

This restriction only arises where the proposed collective job action involves either a workers' committee or employees on their own. In such a scenario, section 104(3)(b) requires the proposed collective job action to be approved or authorized by the relevant trade union, if it exists. The relevant trade union is one which is registered and 'represents the interests of the employees.'⁶⁸ The employees proposing collective job action need not be members of the relevant trade union; what matters is the existence of a registered trade union which represents their interests. A trade union 'which represents the interests of the employees' merely means a trade union registered for the industry or undertaking in which the employees are employed. It will be recalled⁶⁹ that the law on registration of trade unions is anchored on 'industries or undertakings': every registered trade union is so registered in respect of a named industry or undertaking. Once there exists a trade union registered in respect of an industry or undertaking, no collective job action may be engaged in by a workers' committee or employees in the industry or undertaking without its approval or authorisation. This is another clear illustration of the remaining relics of the era of 'one industry, one union'. If there is more than one registered trade union for the industry or undertaking, it must follow that approval or authorisation may be by any of the registered trade unions.

There is no specified format for the approval or authorisation. Further, who is the 'trade union' for this purpose? Is it any responsible official or officer, or is it a decision-making organ or structure of the trade union? It is submitted that the 'trade union' for this purpose is the trade union as a body corporate, and therefore the approval or authorisation must emanate from an organ or structure of the trade union which is mandated, in terms of its Constitution, to make decisions of that nature. Similarly, the communication of the approval or authorisation must be serious and credible and not casual. Workers' committees and employees anxious to avoid being hit by this restriction are advised to insist on a written approval or authorisation from the relevant trade union.

⁶⁸ Section 104(3)(b).

⁶⁹ See Chapter 9.

Restriction 7: Compliance with, or exhausting remedies in, a union agreement

This restriction is in section 104(3)(d) and only applies to a strike proposed by a workers' committee for an industry or undertaking in which there is a 'union agreement' governing the matter in dispute. A 'union agreement' only operates in an industry or undertaking where either there is no registered trade union, or where the registered trade union has lost its competency to represent the employees concerned. In such a scenario, an agent union may be appointed in terms of section 31 to represent the employees concerned. If the agent union negotiates a collective bargaining agreement with the employer or employer's organization for the industry or undertaking for which it is an agent union, that collective bargaining agreement is termed a 'union agreement'.⁷⁰ If the 'union agreement' governs the matter in dispute or provides remedies for the issues in dispute, no strike by a workers' committee is permissible before compliance with the relevant provisions of the agreement. Ironically, this restriction does not apply to a strike organized by employees on their own without the involvement of a workers' committee.

Restriction 8: Strike ballot

Collective job action must be approved by 'the majority of the employees ... voting by secret ballot'.⁷¹ A strike not so approved is prohibited and is illegal. The Act does not define 'majority'. It also avoids specifying whether or not all the employees in the industry or undertaking are entitled to participate in the ballot, regardless of whether or not they are members of the trade union proposing the strike. These issues are partly answered in the Labour (Settlement of Disputes) Regulations, 2003.⁷² As to which employees are eligible to vote, the regulations are not unambiguous and have the following provision:

*The result of the ballot shall be of those who actually cast their vote and not of the total membership of the trade union or employers' organization and those who do not vote shall forfeit their right to vote.*⁷³

The reference to 'not of the total membership of the trade union ...'

⁷⁰ See the definition in section 2 of the Act.

⁷¹ Section 104(3)(e).

⁷² SI 217/2003.

⁷³ Section 8(9) of SI 217/2003.

is a clear indication of the restriction of the strike ballot to members of the trade union proposing the strike. This is no doubt correct. That is the only logical reading of the strike ballot requirement. It is contrary to the freedom of association enshrined in both the Constitution and the Labour Act to impose proposals of a trade union on non-members. It would also undermine the trade union, as non-members would be likely to vote against most of its proposals.

It must be noted, however, that where the proposal is by a workers' committee, all employees are eligible to vote because a workers' committee has no membership and represents all employees regardless of trade union membership.

The regulations provide for a 'simple majority'⁷⁴ Given that there are only two propositions – for or against – a simple majority means that the proposition with more votes than the other prevails. As a matter of common sense, a vote refers to a valid vote and the simple majority relates to valid votes. Votes cast which indicate no clear preference between the two propositions must be disregarded. There can be no room for abstentions. This is in line with the spirit of section 8(9) of the Regulations which discounts 'those who do not vote'.

The balloting is strictly regulated. The eligible employees must be informed by the trade union or workers' committee 'in writing, of the reasons for the ballot and the proposed collective job action'⁷⁵ The voting must proceed in the presence of a labour officer or designated agent^{76,81} who is also tasked with the counting of the votes.⁷⁷

In an industry-wide action, there are responsibilities specifically imposed on the Secretary General (General Secretary) of the trade union involved. He or she shall collect all the results of the ballot from the chairman of the respective workers' committees in the different enterprises⁷⁸ and record the results of the ballot.⁷⁹ It is the responsibility of the trade union 'to endeavour to organize the ballot to cover all undertakings within their scope of coverage in the industry concerned and to make

⁷⁴ Section 8(6) of SI 217/2003.

⁷⁵ Section 8(1).

⁷⁶ Section 8(4).

⁷⁷ Section 8(5).

⁷⁸ Section 8(7).

⁷⁹ Section 8(8).

sure that all eligible employees ... take part in the balloting.⁸⁰

Regarding the timing of the ballot, the Regulations say:

The secret ballot shall be conducted at the work place before the expiry of the period of notice of the intention to resort to collective job action and inside working hours ...⁸¹

There are two respects in which this provision may be *ultra vires* the Act. Firstly, section 104(3)(e) prohibits a trade union or workers' committee not only from engaging in, but also from recommending, collective job action without the agreement of the majority of the employees voting by secret ballot. One reasonable reading of this is that a notice of intent to resort to a strike in terms of section 104(2)(a) is only competent after the trade union or workers' committee has secured the approval of the majority of its members. Secondly, the requirement that the ballot be conducted 'at the workplace ... inside working hours' is unduly restrictive and may be contrary to freedom of association as enshrined in the Constitution and the Labour Act. The process must permit a trade union, if it so chooses, to conduct the ballot outside working hours and at venues of its choice, provided it is in the presence of a responsible independent official such as a labour officer or designated agent.

Restriction 9: Serving notice of intention to resort to collective job action

It is a requirement of the Labour Act that 14 days' written notice of intent to resort to collective job action be given to the employer and the appropriate employment council.⁸² In addition, if the action is by members of a trade union, the notice must also be served on the relevant trade union if the trade union is itself not resorting to the action.⁸³ The notice period appears to be too long to pass the constitutionality test.

There are four requirements for the notice to be valid at law, namely that it must:

- (i) be in writing;
- (ii) specify the grounds for the intended action;
- (iii) be served on the persons specified in the Act, that is the

80 Section 8(10).

81 Section 8(4).

82 Section 104(2)(a).

83 Ibid.

employer, the employment council and, where relevant, the relevant trade union; and

(iv) give a space of at least 14 days before the intended action.

To be valid, a notice must satisfy all the four requirements. If it fails in one or more of these, it is invalid at law. The Labour Act does not define ‘day’ and the question is whether or not weekends and public holidays may be counted as part of the 14 days. It is submitted that weekends and public holidays are included because a ‘day’ is a ‘day’ unless a contrary intention appears. An issue of jurisprudential significance is whether or not the 14 days’ notice may be served when the other processes have not yet been completed. For example, is it competent to serve notice before a certificate of no settlement has been issued? Or to serve notice before approval of the proposed action by a majority of the employees voting by secret ballot? The better view on the interpretation of the relevant provisions must be that the 14-days’ notice can only be competent after all processes have been completed. For example, until a majority of the employees have approved the proposed action, it cannot be said that there is a decision to resort to collective job action. The secret ballot is an essential step in the decision-making process, and before the completion of the step there is no true decision to communicate to the affected parties. The right to resort to collective job action is only acquired after the majority of the employees have approved the action in a secret ballot. Similarly, where a workers’ committee requires the approval of the relevant trade union in terms of section 104(3)(b), it can only be said to have a right to resort to collective job action after that approval has been obtained.

In *Zimbabwe Graphical Workers’ Union v Federation of Master Printers of Zimbabwe & Anor*,⁸⁴ the Supreme Court accepted as valid, a notice which had been set before conciliation and the issuing of a certificate of no settlement. It is this acceptance which complicated matters in that case, in that when the notice lapsed, the trade union could not resort to collective job action as it still had to go through conciliation. The notice remained valid because the Supreme Court considered it a ‘reasonable explanation’ that conciliation still had to be undertaken. The attention of the Supreme Court was not drawn to the philosophy underlying the labour dispute settlement machinery. Conciliation is mandatory and parties must approach it in good faith. Serving notice before conciliation

84 2007 (2) ZLR 103 (S).

undermines the scheme of the Act. The better view of the law is that the right to serve notice only accrues after a certificate of no settlement has been issued and a strike ballot conducted.

In *Moyo & Ors v Central African Batteries (Pvt) Ltd*,⁸⁵ it was held that if a purported notice is not addressed directly to the employer, it is invalid, even if the employer gets to know about it through indirect channels. The facts of that case were that the employees addressed a letter to the officer-in-charge of the local police station, advising him of their intention to go on strike. They also sent notices to the Ministry of Labour and their trade union. No notice was sent directly to the employer. The employer became aware of the notice when the Ministry of Labour intervened. The justification for holding such a notice to be invalid was expressed as follows by Gwaunza AJA:

*The requirement concerning the giving of notice to the other party clearly suggests that the notice in question must be addressed or directed to the relevant other party. No doubt this was intended to ensure that the relevant other party was left in no doubt as to the date, the grounds for and the participants in, the threatened collective job action. No other person, in my view, has greater interest in such information than the relevant other party. While in casu the notice relied on by the appellants, whatever its merits or demerits was written, it was not directed to the respondent. Even though it is not in dispute that the respondent did get to hear of the threatened collective job action, it is evident this was through indirect and, indeed, undefined means not attributable to the appellants. This cannot be what the Legislature intended.*⁸⁶

The intention of the Labour Act in prescribing a specific number of days for the notice means that the strike must take place on the due date or within a reasonable time thereafter.⁸⁷ If the employees give a reasonable explanation for the delay, the notice remains valid. In determining what is a reasonable time or an unreasonable delay, all the circumstances

85 2002 (1) ZLR 615 (S).

86 At p. 621B.

87 *Moyo & Ors v Central African Batteries* (supra); *Zimbabwe Graphical Workers' Union v Federation of Master Printers of Zimbabwe & Anor* (supra); *Net*One Cellular (Pvt) Ltd v Communications and Allied Services Workers' Union of Zimbabwe* SC 89/05.

must be taken into account, including the explanation given for the delay. Thus, a delay by a few days may be regarded as unreasonable in one set of circumstances, while in another it may be adjudged reasonable to delay by over one month. In *Zimbabwe Graphical Workers' Union v Federation of Master Printers of Zimbabwe & Anor*,⁸⁸ the trade union served notice on 15 June 2005. It only resorted to collective job action on 25 July 2005, over three weeks after the expiry of the notice on 29 June 2005. The Supreme Court held the notice of 15 June 2005 as still valid for the action on 25 July 2005. The basis for this was that the trade union had given a reasonable explanation for the delay, namely that when the notice expired on 29 June 2005, the trade union had not yet acquired the right to strike because it still had to satisfy the other requirements of section 104, particularly conciliation. A certificate of no settlement was only issued on 21 July 2005 and that was the point at which the trade union acquired the right to resort to collective job action. The delay, according to the court, was just four days (from 21 to 25 July 2005). A four-day delay was reasonable. Sandura JA had this to say:

*It seems to me that the delay of four days in commencing the collective job action was not unreasonable, bearing in mind the fact that the Union had to organise the collective job action and inform its members throughout the country about the decision to resort to such action after the certificate of no settlement had been issued.*⁸⁹

In *Moyo & Ors v Central African Batteries (supra)*, the employees sought to rely on a notice served on 26 August 1997 for a collective job action which commenced on 3 December 1997, about 3 months after the expiry of the notice. The Supreme Court was emphatic that, whatever the circumstances, a period of 3 months cannot be considered a reasonable delay.⁹⁰

In *Net*One Cellular(Pvt) Ltd v Communications & Allied Services Workers' Union*, it was held that a notice served on 10 May 2004 could not support a strike which commenced on 15 June 2004, about 12 days after the expiry of the notice.

If the notice lapses and no strike ensues, a fresh notice is required for

⁸⁸ *Supra*.

⁸⁹ At p. 113D.

⁹⁰ At p. 619F.

an strike that may be contemplated thereafter, even where the dispute is the same and is continuing.⁹¹ *A fortiori* where the notice has lapsed and the dispute is different. This is also the case where the dispute giving rise to the notice is resolved but resurfaces later, owing to the failure of implementation of the suggested solution. The resolution of the dispute, however temporary, breaks the chain and a fresh notice is required.

The grounds which must be stated in the notice must (i) not be different from the issues constituting the dispute between the parties, (ii) have been the subject of conciliation and (iii) be contained in the certificate of no settlement. If not, the notice is illegal and the resultant strike unlawful for a contravention of section 1094(1)(a). Further, where the notice sets out the correct grounds, as required, but it emerges that the collective job action was embarked upon for different reasons, the strike is unlawful.⁹²

In *Cole Chandler Agencies (Pvt) Ltd v Twenty-Five Named Employees*,⁹³ the employees gave notice to the Minister of Labour and copied the notice to their employer. The Supreme Court was of the view that this 'cured the defect' of not sending notice directly to the employer.⁹⁴

Where a strike is interrupted and called off from time to time to give a chance to various attempts at resolving the dispute giving rise to it, no fresh notice is required for its resumption where it is established that the strike is one continuous process suspended from time to time.⁹⁵ The facts of the *Cole Chandler* case illustrate this proposition. The employees served notice in May 1988 to go on strike. On 1 June 1988, the Ministry of Labour intervened before the strike commenced and referred the dispute to the Labour Relations Tribunal. However, nothing happened and the employees went on strike on 12 March 1989. They did not serve a fresh notice. On 7 April 1989 the Ministry intervened again, through a labour relations officer who ordered the employer to comply with certain demands of the employees. Again, nothing happened. The employees resumed their strike in July 1989 without serving any notice. The employer dismissed them on the basis of participation in an unlawful strike. The

91 *Moyo & Ors v Central African Batteries (supra)*, *Net*One Cellular (Pvt) Ltd v Communications & Allied Services Workers' Union (supra)*.

92 *Net*One Cellular (supra)*.

93 SC161/1998.

94 At p.1 of cyclostyled judgment.

95 See *Cole Chandler* case (*supra*).

dismissals were set aside on the ground that the strike was not illegal, as no fresh notice was required.

Stopping/breaking a strike or a proposed strike

One recognized avenue for stopping or breaking a strike or proposed strike is a show cause order. A strike or proposed strike may only be lawfully interfered with through a show cause order if it is regarded under the Labour Act as an ‘unlawful collective action’.⁹⁶ If it is not, there is no scope in the Labour Act for a show cause order. For example, a collective job action which is in compliance with section 103(3), but is unlawful by virtue of a contravention of section 103(2), cannot be subjected to a show cause order process.

What is a show cause order? The answer requires an understanding of another concept, a ‘disposal order’. A ‘disposal order’ is an order given by the Labour Court directing the termination, postponement or suspension of an unlawful collective action.⁹⁷ In addition, the order may direct that the issue giving rise to the unlawful collective action be referred to the labour dispute machinery in Part XII of the Act, i.e. the dispute is taken to a labour officer for conciliation and/or reference to arbitration.⁹⁸ Before a disposal order is made, it is mandatory that a ‘responsible person’ for the unlawful collective job action be given an opportunity to say why the disposal order should not be given. A show cause order is the order that calls upon the responsible person to appear before the Labour Court and say why the unlawful collective job action should not be terminated or postponed or suspended through a disposal order.⁹⁹ The show cause order must specify the date, time and place of the Labour Court hearing and the proposed content of the disposal order. In addition, it may direct that the unlawful collective action concerned be terminated, postponed or suspended pending the issuance of a disposal order.¹⁰⁰

Several legal issues arise from show cause and disposal orders. Firstly, a disposal order is predicated upon a show cause order. There can be no disposal order without a show cause order. If a show cause order is invalid, any purported disposal order arising therefrom is a nullity.

96 Section 106.

97 Section 107(2).

98 Section 107(2)(b).

99 Section 106(2).

100 Section 106(2)(b).

Secondly, it is only the Minister who can issue a show cause order. This interpretation of the Labour Act was enunciated in *Cargo Carriers (Pvt) Ltd v Zambezi & Ors.*¹⁰¹

Thirdly, the Minister may act on his or her own initiative or upon an application by 'any person affected or likely to be affected'.¹⁰² The latter is invariably the employer in the case of a strike. The proviso to section 106 (1) states:

Provided that the Minister may call both parties to appear before him or her for submissions before he or she issues a show cause order if he or she deems it necessary that they appear.

It is submitted that the Minister's discretion in deciding whether or not to hear the parties before issuing a show cause order is not unlimited. The Minister must hear the parties where it would be grossly unreasonable for him or her to issue a show cause order without hearing both sides. For example, where the Minister has no independent information, it is grossly unreasonable to issue a show cause order on the mere say-so of one party to the dispute. The Minister need not hear the parties himself or herself. It is sufficient if the parties are heard by his or her official, as long as the Minister makes the final decision based on a detailed record prepared by the official concerned.

Fourthly, the Labour Court is required to 'inquire into the matter' before deciding whether or not to issue a disposal order.¹⁰³ For purposes of the inquiry, it 'shall afford the parties concerned an opportunity to make representations in the matter'.¹⁰⁴ What is the scope of the inquiry? The scope is evident from the scheme of the Act: show cause and disposal orders provide a speedy avenue to stopping an unlawful collective job action. Accordingly, the inquiry must necessarily focus on the lawfulness or otherwise of the collective job action. When sitting pursuant to a show cause order, the Labour Court is not adjudicating over the underlying dispute but is being called upon to determine whether or not there are grounds for allowing the action to continue. On a proper interpretation of section 107(2), if the Labour Court establishes that the collective job

101 1996 (1) ZLR 613 (S).

102 See 106 (1).

103 Section 107 (1).

104 Ibid.

action is unlawful, it has no discretion but to issue a disposal order. If the job action is lawful, there is no basis for a disposal order. The Labour Court only has a discretion regarding the contents of a disposal order, not on whether or not to issue the order.

In issuing show cause orders, the Minister must act strictly in terms of section 106. For example, it has been held that the Minister has no power to issue a second show cause order in the same matter and in respect of the same dispute.¹⁰⁵ The relevant facts in the *Zimbabwe Graphical Workers' Union* case were as follows: on receipt of a notice of intention to go on strike, the employer applied for a show cause order. The Minister issued the order directing the parties to appear before the Labour Court. The parties appeared before the Labour Court and a disposal order was issued, referring the dispute to a labour officer for conciliation. Conciliation failed and the labour officer then issued a certificate of no settlement. The workers then resorted to strike action in terms of their earlier notice. At this point, the employer returned to the Minister for another show cause order, which was issued, directing the parties to appear again before the Labour Court. On this second appearance, the Labour Court declared the strike unlawful. The Supreme Court held the second show cause order invalid on the basis of lack of power by the Minister to issue it. Accordingly, the disposal order issued by the Labour Court was also null and void as the matter was not properly before the Labour Court.

The procedure under sections 106 and 107 envisages a full enquiry in which the employees targeted for dismissal, or their representatives, have an opportunity to make their case, but once the disposal order is made after such an enquiry no further procedure is required.¹⁰⁶ Service of a disposal order on the workers' committee is sufficient service on striking employees if it is clear that the workers' committee is their representative throughout the proceedings.¹⁰⁷ The workers' committee is not entitled to refuse service, and where it does refuse, service shall be deemed to have

105 *Zimbabwe Graphical Workers' Union v Federation of Master Printers of Zimbabwe & Anor* 2007 (2) ZLR 103 (S).

106 *Anele Dube & 167 others v Unifreight Ltd & the Minister of Labour and Social Welfare*, SC 101/1999; *Tonderayi Tsingano & Ors s v Munchville Investments* SC 163/1998.

107 *Anele Dube (supra)*; *Tsodzo & Ors v Saybook (1978) (Pvt) Ltd & Ors* SC 13/1999; *Tonderayi Tsingano (supra)*.

taken place at the time of their refusal.¹⁰⁸

It appears that the employer may make reasonable adjustments to the disposal order regarding extending the time for compliance if there are delays in bringing the disposal order to the attention of the strikers.¹⁰⁹ Further, the time for compliance need not be long – 30 minutes was held sufficient in *Anele Dube (supra)*.

Regarding the contents, every disposal order must direct the termination, postponement or suspension of the unlawful collective job action. The discretion which the Labour Court has in this regard relates to whether or not it may refer the issue giving rise to the action to the machinery in Part XII of the Act. If the Labour Court decides to so refer the issue, then its order on termination, postponement or suspension of the unlawful collective job action must be framed so as to be valid ‘pending the determination of the issue’.¹¹⁰ This means that there are two broad choices for the Labour court regarding the content of a disposal order, either (i) a termination, postponement or suspension *as an end in itself*, or (ii) a termination, postponement or suspension pending a determination of the issue in terms of Part XII. For the second choice, the Labour Court itself must put in motion the machinery in Part XII.

Section 107(3) lists a number of additional actions which may be authorized by a disposal order. These include suspension or discharge of the employer’s liability to pay wages or benefits to strikers, suspension, or rescission of registration of the trade union and prohibition of collection of union dues. It is submitted that none of these actions may stand alone: the action must be in addition to one of the two choices available to the Labour Court regarding the content of a disposal order.

Fifthly, where the strike is engaged in by a group of employees who are not organized by a workers’ committee or trade union, there is no scope for a show cause order because there is no ‘responsible person’ to call upon. Section 106(1) defines a ‘responsible person’ as ‘a workers’ committee, trade union...’ and this excludes unorganized workers.

In *ZESA v ZESA Employees*,¹¹¹ the Labour Court, in a disposal order, purportedly provided for the lifting of the suspension of strikers. The suspension had been made by the employer prior to the issuance of a

¹⁰⁸ *Anele Dube (supra)*.

¹⁰⁹ *Ibid*.

¹¹⁰ Section 107(2)(b).

¹¹¹ 2005 (1) ZLR 127 (S).

show cause order. The Supreme Court held that the Labour Court had no power in terms of section 107 to lift the suspension imposed on the striking employees.

Consequences of a lawful strike

There is specific provision in the Labour Act regarding the effect of a lawful strike on the contract of employment: participation in a lawful strike does not breach the contract of employment.¹¹² The Labour Act also makes it clear that ‘an employer is not obliged to remunerate an employee for services that the employee does not render during’ the lawful strike.¹¹³ This means that the Labour Act enshrines the principle of ‘no work, no pay’.

Even where the strike is in the form of a ‘go-slow’, the ‘no work, no pay’ principle still applies, and the workers are not entitled to partial remuneration.¹¹⁴ This is because partial performance of a contractual obligation is still a breach of contract and the employer’s reciprocal obligation to pay remuneration is predicated on proper performance. This is also supported by the principle: a strike is a strike regardless of its form.

The full weight of the ‘no work, no pay’ principle was felt in *National Railways of Zimbabwe v Zimbabwe Railway Artisans Union & Ors*,¹¹⁵ where the Supreme Court upheld an appeal against the Labour Court’s judgment which had ordered the employer to reinstate the salaries and wages it had withheld from employees on strike. Ziyambi JA neatly summarised the position as follows:

*At common law, the obligation of an employer to pay wages is dependent upon performance by the servant of the work that he contracted to do ... The common law position ... is restated in section 108(4) of the Act ... The point being made here is that the striking employee is not entitled to remuneration even where the ‘strike’ is lawful.*¹¹⁶

However, where the employee’s remuneration ‘includes payment in kind by way of accommodation, the provision of food and other basic amenities of life’, the employer is obliged to continue with such pay-

112 Section 108(3) as read with section 108(2).

113 Section 108(4).

114 *3M SA (Pty) Ltd v SACCAWU & Ors* 5 BLLR 483 (LAC).

115 2005 (1) ZLR 314 (S).

116 At pp. 345D-346A.

ment in kind during the lawful strike.¹¹⁷ After the conclusion of the lawful strike, the employer may recover the monetary value of the payment in kind but this can only be done by instituting an action in the Labour Court.¹¹⁸ The net effect of all this is that the contract of employment is 'suspended' during the lawful strike.¹¹⁹ The Act prohibits termination of employment on the ground of threatening or recommending or engaging in any lawful strike.¹²⁰ Workers' committees and trade unions are granted immunity from civil liability or any proceedings arising from the lawful strike.¹²¹ The immunity does not extend to wilful acts or omission, which cause destruction of or damage to property.¹²²

Where a strike is lawful, the code of conduct cannot be used at all, whatever other offences appear competent therein.¹²³ Chidyausiku CJ had this to say:

*I have no doubt that an employee cannot be dismissed from employment for participating in a lawful collective job action, even if such participation contravenes a code of conduct, such as absence from work in excess of five days contrary to the provisions of the code of conduct.*¹²⁴

The reason for this position is that the code of conduct is subject to the Labour Act.¹²⁵

Consequences of an unlawful strike

The consequences of an unlawful strike are legion. It is useful to discuss them under the following sub-headings: criminal sanctions, suspension of check-off scheme, civil liability consequences to the trade union, and

117 Ibid.

118 Ibid.

119 See *Food & General Workers' Unions & Ors v Minister of Safety & Security & Ors* (1999) 20 ILJ 1258 (LC) at 19.

120 Section 108(3).

121 Section 108(2).

122 Ibid.

123 See *Communications & Allied Services Workers' Union of Zimbabwe v Tel*One (Pvt) Ltd* 2005 (2) ZLR 280 (H); *Tel*One (Pvt) Ltd v Communications & Allied Services Workers' Union of Zimbabwe* 2006 (2) ZLR 136 (S)

124 At p. 145B in *Tel*One (Pvt) Ltd (supra)*.

125 Per Makarau J in *Communications & Allied Services Workers' Union* at p. 288D.

dismissal of strikers.

Criminal sanctions

The Labour Act imposes heavy criminal penalties on workers' committees and trade unions involved in unlawful collective action.¹²⁶ There are ten different actions relating to unlawful collective job action which are regarded as criminal offences. These are recommending; advising; encouraging; threatening; inciting; commanding; aiding; procuring; organising; and engaging. None of these actions is defined. Some may be synonymous. For purposes of interpretation, the ordinary meaning of these words is to be preferred.

Criminal liability, for an unlawful collective action, is not restricted to the workers' committee or trade union but extends to every official or office bearer of the workers' committee or trade union.¹²⁷ This means that the trade union, as a separate legal persona and each of the officials and office bearers are criminally liable and the conviction of one does not absolve the others.

On being convicted of a criminal offence created by section 109(1), the penalty is a fine not exceeding level fourteen or imprisonment for a period not exceeding five years or both such fine and such imprisonment.

Criminal liability is further extended to any person outside the world of work who 'recommends, advises, encourages, threatens, incites, commands, aids or procures any collective action... with the intention or realizing that there is a risk or possibility of bringing about such collective action'.¹²⁸ On conviction, such a person faces the same penalty as those in the world of work.¹²⁹ There are additional offences in section 112 which include disobeying a show cause or a disposal order.

Suspension of check-off scheme

The Minister has power to suspend, for a period not exceeding twelve months, the right of the trade union to levy, collect or recover union dues by means of a check-off scheme. The Minister may only exercise this power where he or she 'believes on reasonable grounds' that the trade union is involved in an unlawful collective action.¹³⁰ The expres-

126 Section 109(1) of the Act.

127 Ibid.

128 Section 109(2).

129 Ibid.

130 Section 109(3).

sion 'believes on reasonable grounds' requires the Minister to apply his or her mind to the facts and to make a rational decision. Accordingly, the Minister's decision to suspend the right to a check-off scheme is subject to judicial review. There are two circumstances in which the suspension of the check-off scheme may be ordered. These are (i) simultaneously with a show cause order or (ii) independently or instead of a show cause order.

The suspension of the right to a check-off scheme may be made simultaneously with the issuing of a show cause order.¹³¹ Where this is so, the order shall be deemed cancelled if the Labour Court declines to grant a disposal order.¹³² If a disposal order is issued, it must address the issue of the suspension of the check-off scheme: either incorporate the Minister's suspension in full or with modification or cancel it.¹³³ The scheme of the Labour Act is that where the suspension of the check-off is made simultaneously with a show cause order, the ministerial suspension must not have life beyond the intervention of the Labour Court.

Where the suspension of the check-off scheme is made independently or instead of a show cause order, it shall be deemed to be cancelled if criminal proceedings against the trade union are not instituted within thirty days of the order of suspension.¹³⁴ If criminal proceedings are instituted within thirty days but eventually lead to an acquittal, the suspension shall be deemed cancelled on the date of the acquittal.¹³⁵

It must be emphasized that the Minister's power is limited. He or she can only effect a suspension for a specific period and not a permanent prohibition. The Minister only has power over a check-off scheme. He or she cannot interfere with any other mode of collection of union dues.

Civil liability consequences for the trade union

The Labour Act imposes civil liability on both organizers of, and participants in, an unlawful collective job action. The trade union, every official or office-bearer of the trade union and every individual employee who participates are jointly and severally liable 'for any injury to or death of a person, loss or damage of property or other economic loss, including

131 Section 109(4).

132 Section 109(5).

133 This interpretation is derived from a proper reading of section 107(3).

134 Section 109 (5)(a).

135 Ibid.

the perishing of goods caused by the employees' absence from work, or caused by or arising out of or occurring during' an unlawful collective action.¹³⁶ The Act creates two avenues for the affected party to recover compensation. The affected party may sue for damages in a civil court in terms of section 109(6). Alternatively, the affected party may wait for criminal proceedings to be instituted for the offence in section 109(1). A court convicting any person of any offence in terms of section 109(1) is obliged, if an injury or loss has occurred, to award compensation to any person who has suffered personal injury or whose right or property has been lost or diminished.¹³⁷ The court so convicting has no discretion in the matter. If there is loss or damage and the person convicted is liable in terms of section 109(6) for that loss or damage, it is mandatory for the court to award compensation.

The civil liability imposed by section 109(6) is ridiculously wide. For example, civil liability for the death of a person covers loss of support by the dependants of the deceased while the concept of 'economic loss' extends to what has been termed 'pure economic loss' in the law of delict.

Dismissal of strikers

Under the common law, a strike is a fundamental breach of the contract of employment entitling the employer to dismiss the employee summarily. Summary dismissal has not been part of our law for almost our entire post-independence period. It was abolished by statute. An employee who is, or has been, engaging in unlawful collective job action is still covered by the protection in section 12B(1) which says:

Every employee has the right not to be unfairly dismissed.

This means that, as a general rule, every purported dismissal of strikers must comply with section 12B. As already noted, procedurally there are only two routes to a fair dismissal: in terms of an employment code or under the national employment code provided for by SI 15/2006. Whichever route is followed, it is trite that participation in an unlawful strike is serious misconduct, in that it is conduct inconsistent with the fulfilment of the express or implied conditions of the contract of employment.¹³⁸

It is also well-established that, despite having participated as a group

136 Section 109(6).

137 Section 109(7).

138 See *Wholesale Centre (Pvt) Ltd v Mehlo & Ors* 1992 (1) ZLR 376 (H); *Kadoma Magnesite (Pvt) Ltd v Regional Hearing Officer & Ors* 1991 (1) ZLR 283.

in an unlawful collective job action, an employer is entitled to charge employees individually with acts of misconduct connected with or arising from the strike.¹³⁹ In *Zimpost (Pvt) Ltd v Communications & Allied Workers' Union*,¹⁴⁰ a group of employees took part in an unlawful strike for six days. When the strike ended, the employer took disciplinary action against each of the employees individually. Each was found guilty and dismissed from employment. The trade union challenged the dismissals as an unfair labour practice. It contended that the employer should not have charged the employees individually with conduct they committed collectively as a group. In its view, disciplinary proceedings ought to have been commenced against the employees as a group. This contention found favour with both the arbitrator and the Labour Court. The Supreme Court rejected it and held that there was nothing in the Labour Act which precluded an employer from charging the employees individually.

Where a company issues an ultimatum to employees engaged in an unlawful collective job action to report for duty by a stated time or risk dismissal, it may be taken to have waived its right to dismiss the employees.¹⁴¹

An issue which arises is whether or not there is an additional separate and special procedure for the dismissal of strikers. This issue arises because of the provisions on show cause orders and disposal orders. In particular, section 107(3)(a)(ii) says that a disposal order may provide for:

the dismissal of specified employees or categories of employees engaged in the unlawful collective action.

In section 107(3)(a)(ii), it is said that a disposal order may provide for:

the employer to take disciplinary action in terms of the code or law, or lay off or suspend with or without pay, specified employees or categories of employees engaged in the unlawful collective action.

These two sub-paragraphs provide for different consequences. One is for 'the employer to take disciplinary action' and the other for 'the dismissal of specified employees'. The conclusion is inescapable that a disposal order may sanction the dismissal of strikers without further ado,

139 *Zimpost (Pvt) Ltd v Communications & Allied Workers' Union* 2009 (1) ZLR 334 (S).

140 *Supra*.

141 *Pungwe Breweries (Pvt) Ltd v Solomon Mambondiani & Ors* SC90/2004.

thereby providing an additional, separate and special procedure for the dismissal of strikers. Where the disposal order merely provides for ‘the employer to take disciplinary action’ any dismissal pursuant to the disciplinary action must be fair in accordance with section 12B. However, where the disposal order provides for ‘the dismissal of specified employees or categories of employees’ section 12B does not arise. The dismissal in terms of the disposal order is *ipso facto* lawful.

While the distinction between the two sub-paragraphs of section 107(3) is clear, the Supreme Court removed the distinction in *Anele Dube*¹⁴² by holding that ‘any disciplinary action’ includes a dismissal without a further hearing. In that case, the disposal order provided, *inter alia*, as follows: ‘The employer may take any disciplinary action he deems fit on any workers who fail to comply with the disposal order’. It also ordered the employees to return to work not later than 2.00 p.m. on 4 June 1997. The employer attempted to serve the disposal order on the workers’ committee on the morning of 4 June 1997 but the latter refused to accept the document. Efforts to serve the disposal order on the workers failed until about 3.00 p.m. (after the 2.00 p.m. deadline) when the order was read out by the employer’s representative. By 3.30 p.m., the employees had not returned to work. At about 3.45 p.m. the employer dismissed all the striking employees without any further process and was relying on the above provision of the disposal order. Muchecheitere JA, for the majority, approved this, saying:

The first issue to deal with is whether the disposal order did authorize the dismissal of the appellants on failure to comply with the order to return to work. The submission for the appellants in this court was that the order authorized disciplinary action and that disciplinary action is different to and distinguishable from dismissal. It was argued that if the order had intended to authorize dismissal it would have stated so explicitly. It instead authorized disciplinary action and not dismissal. The order stated that the employer ‘may take any disciplinary action which he deems fit’.

I agree with the reasoning of the learned judge in the court *a quo* that whilst the concepts of disciplinary action and dismissal may be distinguishable and separate concepts they are not self-exclusive. The con-

142 *Supra*.

cept of dismissal may be and is contained within the meaning of disciplinary action ... I therefore agree that the use of the words 'may take any disciplinary action' taken together with the fact that the appellants had refused to obey the terms of the show cause order, suggests that it was intended to authorize the first respondent to dismiss those employees who failed to return to work unconditionally if it so wished.¹⁴³

Given the broad scope of the range of options available to the Labour Court under section 107(3), the dismissal of strikers directly through a disposal order must be an exceptional measure only available on strict conditions. These conditions, from a careful reading of sections 106 and 107, are: (i) the dismissal of the specified employees must be part of the proposed orders or actions in the show cause order in terms of section 106(2)(a)(ii), (ii) the specified employees must have disobeyed the provisions of a show cause order made in terms of section 106(2)(b) directing them to terminate, postpone or suspend the unlawful collective action pending the Labour Court hearing, and (iii) the employees concerned must have been afforded an opportunity on the return day of the show cause order to make representations specifically on the issue of their dismissal through the disposal order.

This approach ensures that the striking employees are afforded the same protection against unfair dismissal contemplated by section 12B.

As the disposal order procedure is not mandatory, an employer faced with an unlawful collective job action is not obliged to invoke the procedure at all. The employer may immediately utilize its code of conduct (if applicable) or invoke SI 15/2006.¹⁴⁴ In the *Marondera Rural District Council* case,¹⁴⁵ employees served notice of their intention to go on strike. As a result of the notice, a meeting was held with the employer at which the employees agreed to call off the planned strike. On the day of the intended strike, the employees turned up for work but, after working for a few hours, commenced their strike action. They locked up all the gates to the employer's premises and turned away many ratepayers who wanted to settle their accounts. The employer appealed to the employees to return to work while their grievances were still being considered but they refused. The employer then suspended all the striking employees and sought permission for their dismissal. The employer succeeded be-

143 At pp. 4-5 of cyclostyled judgment.

144 See *Marondera Rural District Council v Morris & Ors* 2006 (1) ZLR 63 (S).

145 Ibid.

fore a labour officer but on appeal to the Labour Relations Tribunal, the terminations were set aside on the basis that the employer should have applied for a show cause order. The Supreme Court reversed the decision of the Labour Relations Tribunal and held that the employer was not obliged to invoke the disposal order procedure as it was not mandatory.

In providing for dismissal of strikers through a disposal order as an additional, separate and special procedure, the framers of the Labour Act were alive to the complexities that may arise from unlawful collective job actions involving large numbers of employees and in circumstances where disciplinary action based on taking each individual employee separately would simply be nightmarish or well-nigh impossible. *Cargo Carriers* is a case in point.

Cargo Carriers is authority for the proposition that where the strike is massive and the provisions of the code of conduct are dwarfed, the correct procedure in seeking to dismiss strikers is through the avenue of a disposal order in terms of Part XIII of the Act. In *Tel*One (Pvt) Ltd*,¹⁴⁶ the Supreme Court reiterated its earlier rejection in *Zimbabwe Iron & Steel Co. Ltd v Dube*¹⁴⁷ of the notion that dismissal through a disposal order under Part XIII was the only permissible procedure for dealing with dismissal of strikers. Put differently, the rejected notion is to the effect that a code of conduct cannot, as a matter of law, be used in disciplinary cases involving employees who have taken part in an unlawful collective job action. The result of this rejection is that dismissal through a disposal procedure is merely one of the available avenues. The other avenues, as already noted, are a registered code of conduct and the Model Code (currently SI15/2006).

There are two important limitations with dismissal through the disposal order procedure. Firstly, the procedure is only available if the unlawful collective job action is still being threatened or engaged in at the time the procedure is being invoked. If the unlawful collective job action has ended on its own, the procedure either falls away or does not arise.¹⁴⁸ Secondly, the right of the employer to dismiss is dependent upon the exercise of discretion by the Labour Court.¹⁴⁹ An employer who initiates the

146 *Supra*.

147 1997(2) ZLR 172 (S).

148 *Zimpost (Pvt) Ltd v Communications & Allied Workers' Union* 2009 (1) ZLR 334 (S).

149 *Ibid*.

procedure leading to a disposal order has no automatic right to a dismissal: the matter is up to the Labour Court, which may refuse to authorize the dismissal of the strikers.

It seems to follow that an employer who initiates dismissal proceedings through the disposal order procedure and is refused a disposal order by the Labour Court cannot thereafter have recourse to the code of conduct. Given the social justice thrust of the Labour Act, one must read into it a labour relations version of *autrefois acquit*.

The issue of using a code of conduct for the dismissal of strikers does not raise any problem where the code itself has a specific offence of 'participation in an unlawful collective job action' and the employer charges the employees with that offence. This was the situation in the *Zimbabwe Iron & Steel Co v Dube* case. Problems arise in two situations: either (i) the code of conduct does not have a specific offence of participation in an unlawful collective job action, or (ii) even though the code has such a specific offence, the employer decides to charge the employees with some other offence in the code which is deemed competent.

Regarding (i), it is a matter of interpretation of the code of conduct whether or not some other offences therein may be competent. For example, the offence of 'an act or conduct inconsistent with the fulfillment of the express or implied terms and conditions of employment' covers participation in an unlawful strike. Regarding (ii), in *Net*One Cellular (Pvt) Ltd*,¹⁵⁰ the Supreme Court held that an employer is entitled to choose to charge striking employees with some other competent offence, despite the existence in the code of an offence of participation in an unlawful strike. In that case, it allowed the employer to charge striking employees with the offence of 'absence from work for five or more days without permission or reasonable excuse'. The Supreme Court followed this approach again in *Tel*One (Pvt) Ltd v Communications & Allied Service Workers' Union*.¹⁵¹ In view of these two Supreme Court decisions, the law is therefore that an employee who has participated in an unlawful strike may be charged with, and convicted of, any offence in the code of conduct of the employer's choice provided that the essential elements of that offence are satisfied.

It is submitted that this approach is only correct where there is no prejudice to the employee/s. It is of doubtful correctness where the choice

¹⁵⁰ *Supra*.

¹⁵¹ 2006 (2) ZLR 136 (S).

of another offence is actuated by the need to secure an advantage for the employer, such as where there are difficulties in pursuing the offence of ‘participation in an unlawful collective job action’. The situation in *Net*One Cellular* itself is a case in point. In that case, clause 8 of the code of conduct provided as follows:

instigating and/or taking part in an unlawful job action - to be handled in terms of the Labour Relations Act [Chap 28:01].

The employer wanted to avoid ‘handling’ the matter in terms of the Act and decided to charge the employees with ‘absence from work for five or more consecutive days without permission or reasonable excuse’. The employees were convicted and dismissed. The facts were the same in *Tel*One* (*supra*). The Supreme Court approved this approach. This cannot be correct. The code of conduct had a specific offence of, and a specific procedure for, participating in an unlawful strike. The maxim *expressio unius exclusio alterius* must apply.

More fundamentally, charging strikers with the offence of ‘absence from work for five or more consecutive days without permission or reasonable excuse’ is problematic. The assumption by the Supreme Court that participation in an unlawful strike cannot be a defence to the charge overlooks the jurisprudential nature of a ‘reasonable excuse’. It is trite that a reasonable excuse is not the same thing as a lawful excuse. The better view is to regard, in general, participation in an unlawful strike as a reasonable excuse thereby ousting that offence. Most strikes are unlawful on technical grounds and it is common for participants to be unaware of the unlawfulness thereof. As a matter of legal policy, participation in a strike must be approached directly and dealt with as such, except where not doing so is for the benefit of the employees concerned.

A way has to be found for the Supreme Court to halt this approach to avoid ridiculous consequences such as in *Speciss College v Maxwell Chiriseri & Ors.*¹⁵² The respondents, who were teachers, went on strike on 6 September 2006, which was the beginning of a new school term. The strike involved all 16 teachers at the school. As a result of the strike, new students wishing to register for classes were turned away, tuition fees were not collected and no lessons took place. While 13 of the teachers were given final warnings, the three respondents who were the leaders of the strike, were charged with, and convicted of, ‘sabotage’ and were dismissed. They

152 SC2/2013.

were not charged with ‘participation in an unlawful strike’. ‘Sabotage’ was defined in the code of conduct as:

Any wilful act by an employee to interfere with the normal operations of the employer's business by damaging any plant, machinery, equipment, raw materials or products or by interrupting any supplies of power, fuel, materials or services necessary to the operations.

There was no allegation of any damage to plant, machinery or equipment. It was the very fact of withdrawing labour which was regarded by the employer as ‘sabotage’. On appeal to the Local Joint Committee, the dismissal was set aside on the ground that there was no sabotage. The employer appealed to the NEC and lost. It made a further appeal to the Labour Court and lost again. Then it made a final appeal to the Supreme Court and won. Ziyambi JA said:

*In my view, the unlawful withdrawal of their services by the respondents did constitute sabotage.*¹⁵³

This is plainly wrong. The employees merely withdrew their labour. This approach would make every unlawful collective job action an act of ‘sabotage’, a consequence never intended by the legislative provisions regulating collective job action.

Picketing

A ‘picket’ is defined in section 104A as ‘a gathering of members and supporters of a trade union or workers’ committee for either or both the following purposes:

- (a) demonstrating peacefully –
 - (i) in support of any collective job action; or
 - (ii) in opposition to any lock-out; and
- (b) Peacefully persuading other members of the trade union or workers committee or employees of the industry, undertaking or workplace represented by the trade union or workers committee to take part in the collective job action or demonstration.

This definition is largely self-explanatory. What may be added is that

153 At p. 8.

while a picket is typically made up of striking employees, the definition's reference to 'members and supporters' is significant. 'Members' may include employees who are members of the trade union, but are not involved in the strike, such as where the strike is for a particular undertaking or workplace where they are not employed. As long as the employees are members of the relevant trade union, the picket may be constituted entirely by non-striking employees. Although the word 'supporters' is not defined, it is clear that it refers to any members of the public. A supporter need not have any connection whatsoever with the dispute or trade union or undertaking or industry. In general, however, supporters are mainly non-union members. It is submitted that a picket cannot be constituted entirely by supporters. This arises from the use of the word 'and' in 'members and supporters'. Thus a picket as contemplated in section 104A may be made up of members only or of members and supporters but never by supporters only.

A picket may be lawfully conducted 'outside the premises of the employer or in any place to which the public has access'.¹⁵⁴ The expression 'any place to which the public has access' does not mean any place; it is any place reasonably near the employer's premises. A picket may take place inside the employer's premises if so authorized by a collective bargaining agreement or any code of picketing made in terms of section 119. Currently, no such code exists.¹⁵⁵ Even with that authorization, picketing must be in an area of the premises which does not substantially affect production.¹⁵⁶ For a picket to be lawfully conducted as aforesaid, it must be authorized by a registered trade union or workers' committee.¹⁵⁷

The definition makes it clear that the purpose of a picket is either 'in support of' a collective job action (or opposition to any lock-out), or persuading non-strikers to join the strike, or both.

What is meant by 'in support of'? 'In support of' includes (i) speaking to those whom the employer may be seeking to employ as temporary labour or replacement labour and persuading them not to accept employment during the strike as a way of supporting the strike, and (ii) communicating with customers, business associates and members of the public and asking them to suspend or boycott any transactions with the employ-

154 Section 104A (3)(a).

155 Section 104A (3)(b).

156 Ibid.

157 Section 104A (2).

er as a show of support for the strike.¹⁵⁸

‘Demonstrating’ necessarily includes displaying and waving placards with written messages, singing, dancing and chanting slogans in furtherance of their demand.

Is a picket restricted to supporting a lawful collective job action? The answer is No. The definition simply refers to ‘any collective job action’. A useful comparison may be made in this regard with the position in South Africa. Section 69(1) of the Labour Relations Act, 1996 says:

A registered trade union may authorise a picket by its members and supporters for the purposes of peacefully demonstrating –

- (a) in support of any protected strike; or
- (b) in opposition of any lock-out.

Commenting on this provision, leading authors have said:

*Picketing in support of an unprotected strike will not be covered by section 69. However, picketing in opposition to any lock-out, whether protected or unprotected, will be covered.*¹⁵⁹

The provision that the demonstration constituting the picket be ‘peaceful’ requires the picketers not to engage in any action which may be perceived to be violent. For example, in persuading customers and other employees to support the strike, picketers may not prevent them from entering or leaving the employer’s premises.

Is a picket subject to the regulatory framework for public demonstrations in the Public Order and Security Act (POSA)? This depends on the interpretation to be made of section 104A(3), which provides that:

Notwithstanding any other law regulating the right of assembly, a picket authorised in terms of subsection (2) may be lawfully conducted –

- (a) outside the premises of an employer or in any place to which the public has access ...

The reference to the ‘right of assembly’, which is followed by the mention of the ‘premises’ and ‘any place’ and not to the ‘right to demonstrate’, suggests that the provision is concerned with places or venues

158 See the South African Labour Court judgment in *Picardi Hotels Ltd v Food & General Workers’ Union* (1999) 20 ILJ 1915 (LC) at 1921B-F.

159 Basson et al. (2009), p. 337

where persons may gather. In other words, the provision overrides any other law which may purport to prohibit picketers from gathering outside the premises of an employer or any place. The provision does not exempt the picket from provisions of POSA which are meant to prevent public disorder. This is so because section 104A requires the picket to be peaceful, and there is no better way of guaranteeing peace than complying with the law on public order. Accordingly, organizers of a picket have to comply with the provisions of POSA on public meetings and public demonstrations.

Lock-outs

An employer may resort to a lock-out in order to resolve a dispute with employees. The lock-out is used as economic pressure on employees to accept the employer's preferred solution to the dispute. It is the employer's nearest equivalent to a strike. Grogan has the following useful statement on a lock-out:

*A lock-out is the employer's counterpart to a strike. A strike entails the withdrawal of labour by employees to force employers to comply with a demand or to resolve a grievance, a lock-out involves the deliberate withdrawal by employers from their normal contractual obligation to accept their employees' tender of service and to remunerate them in return. The purpose of a lock-out is to confront employees with a choice between doing without their wages for the duration of the lock-out, or yielding to the employer's demand, which is usually to accept a variation of their contracts.*¹⁶⁰

Be that as it may, it is widely accepted across the world that the lock-out cannot enjoy the same protection as the right to strike and that is why it is not part of the Bill of Rights.

A 'lock-out' is defined in section 102 of the Labour Act as

... any one or more of the following acts or omissions by any person who is or has been an employer –

- (a) the exclusion by him of any person or number of persons, who are or have been in his employ, from any premises on which work provided by him is or has been performed; or

160 Grogan (2010), p. 307

- (b) the total or partial discontinuance by him of his business or the provision of work; or
- (c) the breach or termination by him of the contracts of employment of any person or number of persons in his employ; or
- (d) the refusal or failure by him to re-employ any person or number of persons who have been in his employ if that exclusion, discontinuance, breach, termination, refusal or failure is in consequence of a dispute regarding conditions of employment or other matters, and the purpose of that exclusion, discontinuance, breach, termination, refusal or failure is to induce or compel any persons who are or have been in his employ or in the employ of other persons to agree or comply with any demands concerning conditions of employment or re-employment or other matters made by him or on his behalf or by or on behalf of any other person who is or has been an employer.

This definition has three elements, all of which must be present to constitute a lock-out. The three elements are (i) action by the employer (ii) existence of a dispute and (iii) purpose of the action by the employer. Regarding the action by the employer, it must be one or more of the acts specified in the definition.

The use of the word 'person' instead of 'employee' is meant to cover both employees still in service and those who are no longer in the employer's service. Thus, the exclusion of former employees from the employer's premises is an act that may constitute a lock-out if the other two elements are also present. Furthermore, the reference to 'person' in the singular means that it is competent to have a lock-out of a single employee. This is unlike in South Africa, where the legislation does not contemplate a lock-out of a single employee.¹⁶¹

¹⁶¹ Section 213 of the Labour Relations Act. In *Schoeman & Anot v Samsung Electronics SA (Pty) Ltd* (1997) 10 BLLR 1364 (LC), an employee was prohibited from returning to work because of his refusal to accept a reduction in remuneration. The court rejected the contention that the exclusion from work was a lock-out saying; 'An individual employee cannot strike and a lock-out can also not be effected against a single employee. Therefore the action taken by the respondent [the employer] in this regard, was a breach of the employment contract.'

The second element is the existence of a dispute. If there is no dispute regarding 'conditions of employment or other matters', any purported lock-out is illegal. Finally, the purpose of the action must be 'to induce or compel' employees or former employees to accept the employer's demands. There must be a clear demand by the employer, failing which there can be no lock-out at law. This means that the employees must be informed of the nature of the acceptance or compliance expected of them for the lock-out to be lifted. In the South African case of *Vonadium Technology (Pty) Ltd v National Union of Mineworkers & Anor* (1997) 18 ILJ 740 (LC), the employer demanded that employees sign a written agreement that they would abandon their objection to a supervisor they accused of racism before they could be allowed to work. The court held this to be a lock-out as there was a clear demand by the employer. Conversely, in *Sappi Fine Papers (Pty) Ltd v Piennar NO & Ors*,¹⁶² the court held the action by the employer not to be a lock-out because of lack of a demand; the employer unilaterally imposed longer working hours and threatened disciplinary action if employees did not comply. The mere threat of disciplinary action was not sufficient; the employer had not made its intentions clear that its actions were designed to compel the employees to accept working for longer hours.¹⁶³

Lock-outs are said to be of two types, offensive and defensive. These have been explained as follows: 'The ... offensive lock-out, [is] applied by employers to support their aims in changing employment conditions even though the unions have not resorted to industrial action. The defensive lock-out, on the other hand, occurs when employers refuse to allow the continuation of work whenever it is made impracticable by industrial action by the same or by other employees, and in doing so legitimate the non-payment of wages'.¹⁶⁴

In simple terms, an offensive lock-out takes place not as a response to a strike but as a pre-emptive measure while workers are still reporting for work, and a defensive lock-out is in response to a strike. The definition of lock-out in the Labour Act accommodates both offensive and defensive lock-outs.

For a lock-out to be legal, it must comply, *mutatis mutandis*, with the

¹⁶² (1994) 15 ILJ 137 (LAC).

¹⁶³ These and other cases are discussed in Grogan, op cit. pp. 310-11

¹⁶⁴ Jacobs, A.J.M., 'The Law of Strikes and Lock-outs', in Blanpain and Engels (1993), p. 494.

provisions of section 104.¹⁶⁵ This means that

- (i) the dispute in existence must be a dispute of interest,
- (ii) conciliation has failed and a certificate of no settlement has been issued,
- (iii) it is not an essential service, and
- (iv) 14 days' written notice has been served.

Where the lock-out is legal, the employer is required to be contented with it and cannot engage in any additional acts directed at employees without the consent of the Minister.¹⁶⁶ Thus, the employer cannot withhold wages or benefits to any employee locked out without the consent of the Minister. The 'no work no pay' principle has no automatic application in situations of a lock-out. Similarly there can be no lay-off, suspension or dismissal of employees as a consequence of the lock-out without the consent of the Minister.

As with dismissals directly through disposal orders, the Act creates an additional and separate dismissal framework under section 105 pursuant to a lock-out, as long as the consent of the Minister is obtained. In view of the objectives of the Act to promote social justice through, *inter alia*, shielding employees from unfair dismissals, the Minister's consent must be in exceptional circumstances.

An unlawful lock-out has the same consequences as an unlawful strike.

¹⁶⁵ Section 105 (1) (a).

¹⁶⁶ Section 105 (1) (b).

CHAPTER FIFTEEN

STATE EMPLOYMENT

Introduction

Persons who provide service to the State fall into a variety of categories. The most important are:

- The President, Vice-Presidents and Ministers
- Judges, magistrates and other persons presiding over courts
- Members of Parliament, including the presiding officers of Parliament
- Attorney General
- Prosecutor General
- Members of Provincial Councils, including chairpersons of provincial councils
- Members of commissions established by the Constitution
- Auditor General
- The Civil Service, including Permanent Secretaries.
- Staff of Parliament
- Commander of the Defence Forces and members of the Defence Forces.
- Commissioner General of Police and members of the Police Service.
- Commissioner General of Prisons and Correctional Service and members of the Prisons and Correctional Service
- Director General of Intelligence Services and members of the

Intelligence Services

- Employees of Commissions established by the Commission
- Employees of provincial and metropolitan councils

All these persons, for purposes of labour law, are in two groups: *office holders* and *employees*.

Office holders

Not every rendering of personal services to the State is governed by labour law; some are governed exclusively by constitutional law (in its expanded sense of including administrative law). Where the rendering of services is governed by constitutional law, the rights and duties of the office-holders are determined by that law. The courts which have jurisdiction to deal with any dispute arising therefrom are the High Court, Supreme Court and Constitutional Court. An office-holder is not an employee in the labour law sense but has rights and duties. To establish those rights and duties, focus must turn to constitutional law. It is outside the scope of this book to pursue that line. It is sufficient to say that persons falling into the category of office-holders not governed by labour law are:

- President, Vice-President and Ministers;
- Judges;
- Members of Parliament and members of provincial and metropolitan councils including the presiding officers;
- The Clerk of Parliament;
- Attorney General, Prosecutor General and Auditor General;
- Members of Commissions established by the Constitution;
- Commander of the Defence Forces, Commissioner General of Police, Commissioner General of Prisons and Correctional Service and Director General of Intelligence Services.

A case in point is *Zvoma v Moyo NO & Ors.*¹ The applicant was the Clerk of Parliament, appointed in terms of the Constitution of Zimbabwe. He was therefore an office-holder. A motion was moved in Parliament for him to be dismissed from office. The motion was debated and passed, despite a matter pending in the High Court in which the applicant was seeking an order declaring that his dismissal could only be initiated by the Committee on Standing Rules and Orders and not by individual

¹ 2012 (1) ZLR 117 (H).

members of Parliament. The court set aside the purported dismissal and nullified the Parliamentary proceedings on the basis that the actions were in contravention of the Constitution. The court was clear that the Labour Act did not apply.

Employees

The rest of the persons listed in the introduction above provide service as employees and are governed by labour law. However, the labour law applicable to them depends on the nature of their jobs. For this purpose, they fall into two categories: *Civil Service* and *public officers who are not part of the Civil Service*.

The nature of the employment relationship between the State and its employees

Civil Service

Civil servants are not governed by the Labour Act.² Under the common law, derived in this case from English law, a civil servant is employed at the pleasure of the State and thus can be dismissed at will – without notice, without reason and without the need to follow any particular procedure.³ This is no longer the law. The employment relationship is governed by statute and the State's powers are limited by, and must be exercised in conformity with, statute.⁴ The current statute is the Public Service Act (Chapter 16:04).

Given the role of statute in the relationship between a civil servant and the employer, two questions arise: Does a civil servant have a contract of employment? If there is a contract of employment, how is it affected by the employer's exercise of its public power to make or unmake law? It is no longer disputed that a civil servant has a contract of employment. The only issue is how that contract is affected by the dual role of the State, being both employer and legislator. It has been held that the employment relationship between the State and its employees is unique to the extent that the contract of employment may be described as an 'administrative

2 Section 3 of the Labour Act.

3 *Dunn v The Queen* [1896] 1 QB 116; *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.

4 *Commissioner of Police v Wilson* 1981 ZLR 451; *Zimbabwe Teachers' Association & Ors v Chairman, Public Service Commission & Ors* 1996 (1) ZLR 91 (H).

contract of employment.⁵ The implication is that the State has a right to act administratively against the employee (subject to the rules of administrative law) but may also rely on its contractual rights as an employer, provided that reliance on the contract is not in conflict with statute and rules of administrative law.⁶

The main problem is where the State uses its public power to alter its contractual obligations, such as by amending or repealing the statute that grants certain rights to its employees. This is the problem that arose in *Chairman, Public Service Commission & Ors v Zimbabwe Teachers' Association & Ors*.⁷ In that case, a civil servant was entitled to a bonus by virtue of section 31(1) of SI 126 of 1992. which provided:

A person who is serving... on the 1st of January in any year shall, if his service in that year is continuous, be paid the annual bonus at the same time as he is paid his salary for the month of November in that year.

The State, citing financial constraints, decided not to pay a bonus in 1995 and exercised its legislative power to amend the above provision. Through SI 241 of 1995 it inserted a new section 37A into SI 126 of 1992 which read:

Notwithstanding any other provision of this Part, no annual bonus shall be paid to any officer or employee in respect of the year 1995.

The civil servants challenged this exercise of power by their employer, which had the effect of taking away their right to a bonus. In the High Court, they succeeded. Chidyausiku J (as he then was) held that the State was bound by contracts of employment between itself and civil servants and was legally obliged to pay the bonus. He held further that the Public Service Commission (which was the employer on behalf of the State) had no power to amend the provision on bonuses retrospectively. On appeal, the Supreme Court was divided. By a majority of 3-2, the Supreme Court held that the State had power to pass legislation which had the effect of altering its obligations with its employees (whether those obligations were contractual or otherwise). The only limit on that power was that it had to be exercised in conformity with the Constitution. As long

5 See LAWSA, Vol 13, para 972.

6 Ibid. *Administrator, Transvaal v Zenzile* 1991 (1) SA 21 (A).

7 1996 (1) ZLR 637 (S).

as it was exercised in conformity with the Constitution, the courts had no business enquiring into the reasonableness or wisdom of the measures undertaken. The majority, however, was of the view that the bonus had not yet vested at the time the legislative measure was undertaken. Thus, its proposition regarding the legislative power of the State to alter its contractual obligations may be regarded as *obiter* to the extent that it may relate only to vested rights.

The minority's position was that the legislative competence of the Commission did not extend to allowing it to act in breach of its contract with public servants. Said the minority:

*It had no power or authority to break the law, or to pay its employees a lower remuneration than that agreed upon in respect of work already done and a period already entered upon. The Commission was a creature of statute, and could do only what the statute (i.e the Constitution) authorized. It was not authorized to break contracts.*⁸

It is submitted that the law is as put forward by the minority and Chidyausiku J (as he then was) in the court *a quo*. The legislative powers of Parliament are not absolute. They are limited by the Constitution. In section 3, Parliament must legislate with due regard to the values and principles set out therein, which include the 'rule of law'. Section 65(1), provides that every person has a right to 'fair and safe labour practices'. It is clearly not a fair labour practice for any person's conditions of employment to be changed unilaterally and retrospectively merely because they are employed by the State. The 'rule of law' requires the State, in its capacity as an employer, not to take advantage of its other role as a public power to occupy a position different from that of other employers at the expense of its employees.

The law is, therefore, that the State cannot use its legislative power to legislate itself out of its contractual obligations. This also means that it cannot use any rule of administrative law to renege on its contractual obligations. The State can use its legislative powers to alter conditions of employment for the future, such as for future employees or in so far as it is possible with existing employees in respect of rights in the future.

8 At p. 661G.

Security Services (police, army, prison officers and intelligence services)

These are also directly employed by the State. The nature of their employment relationship is no different from that of civil servants. The difference between them and civil servants lies in their terms and conditions of service which are provided for by different statutes.⁹

The State, as an employer, is bound by any constitutional obligations imposed by section 65 of the Constitution, such as the duty to act fairly.¹⁰

Employees of Commissions and bodies set up by the Constitution

The Commissions and bodies set up by the Constitution are: Zimbabwe Electoral Commission, Zimbabwe Human Rights Commission, Anti-Corruption Commission, Gender Commission, Zimbabwe Media Commission, National Peace and Reconciliation Commission, Judicial Service Commission, Zimbabwe Land Commission, Provincial and Metropolitan Councils, National Prosecuting Authority, Auditor General and Attorney General.

All employees of these bodies are employed by the State. However, that in itself has no material significance in labour law. What is material is whether or not they are to be regarded as civil servants. If an employee is a civil servant, his or her terms and conditions of employment are governed by the law applicable to civil servants. The most significant aspect of being a civil servant is that the Labour Act does not apply. If a State employee is not a civil servant, the general rule is that the Labour Act applies except where the Constitution has provisions regulating the employment relationship. In terms of section 199 of the Constitution, some categories of persons employed by the State are excluded from the Civil Service. One of the categories excluded is 'any other person whose office or post is stated by this Constitution or an Act of Parliament, not to form part of the Civil Service'.¹¹

For an employee of the Commission or body set up by the Constitution not to be a civil servant, there must be a provision of the Constitution or an Act of Parliament stating that fact. There is no provision of the Constitution which excludes any of the employees of the above bodies from the Civil Service. It has to depend on the provisions of the relevant Acts of Parliament. It appears that virtually every Act of Parliament providing

9 See *Mawere & Anor v Central Intelligence Organization* 2007 (2) ZLR 246 (S).

10 See *Murray v Minister of Defence* (2008) 6 BLLR 513 (SCA).

11 Section 199(2)(e) of the Constitution.

for any of the above bodies, either expressly or by necessary implication, excludes the employees thereof from the Civil Service.¹² For example, section 6(3) of the Zimbabwe Human Rights Act states:

The offices of the Executive Secretary and other members of staff shall be public offices but not form part of the Civil Service.

The significance of not being civil servants is that the employer is not the Civil Service Commission but the appropriate institution of State.¹³ However, the public law character of the employment relationship is the same as that of a civil servant – ‘administrative contract of employment’.

Staff of Parliament

These are specifically excluded from the Civil Service by both sections 154(5) and 199(2) of the Constitution. Section 154(5) states:

The Clerk of Parliament and other staff of Parliament;

- (a) are appointed on terms of service approved from time to time by the Committee on Standing Rules and Orders; and*
- (b) are public offices but do not form part of the Civil Service.*

Employees of other statutory bodies controlled by the State

Employees of statutory bodies controlled by the State, such as universities, the Reserve Bank, parastatals and local authorities are not employed by the State. They are not civil servants despite the fact that the State may be fully responsible for the funding of the statutory body.¹⁴

What law applies?

Section 3 of the Labour Act provides that the Labour Act applies to all employers and employees ‘except those whose conditions of employment are otherwise provided for in the Constitution’. For the avoidance of doubt, it specifically excludes from the scope of the Act, civil servants,

12 Some of the relevant Acts are Judicial Service Act (Chapter 7:18); Audit Office Act (Chapter 22:18); Attorney General’s Office Act (Chapter 7:19); Zimbabwe Human Rights Commission Act (Chapter 10:30); Electoral Act (Chapter 2:13).

13 Such as the Zimbabwe Electoral Commission or Zimbabwe Human Rights Commission or National Prosecution Authority.

14 *Midlands State University Council v Midlands State University Lecturers’ Association* 2005 (2) ZLR 213 (S).

members of a disciplined force of the State, members of any disciplined force of a foreign State who are in Zimbabwe under any agreement concluded between the government and the government of that foreign State and ‘such other employees of the State as the President may designate by statutory instrument’. Members of the ‘Health Service’ are civil servants and therefore not covered by the Labour Act despite purportedly falling under the Health Service Act (Chapter 15:16).

The issue is to determine which other category of State employees is excluded from the Labour Act. Being employed by the State is not, in itself, a sufficient basis for exclusion from the ambit of the Labour Act. An additional basis is required, namely that the ‘conditions of employment are otherwise provided for in the Constitution’. This expression merely means that the Constitution must specifically provide a mechanism for the regulation of the terms and conditions of employment. If there is no such provision in the Constitution, the Labour Act shall apply, whether or not the relevant Act of Parliament purports to be providing for terms and conditions of employment. Whenever the Labour Act applies; section 2A(3) of it comes into play. It states:

This Act shall prevail over any other enactment inconsistent with it.

The following are persons in State employment who are excluded from the Labour Act by virtue of their conditions of employment being ‘otherwise provided for in the Constitution’:

- Staff of Parliament¹⁵
- Employees of a Provincial or Metropolitan Council.¹⁶
- Employees of the National Prosecuting Authority¹⁷
- Judicial officers other than judges¹⁸
- Employees of the Judicial Service Commission other than judicial officers¹⁹

There is no provision providing for conditions of service of members of independent commissions, the Attorney General’s officers and the Auditor General’s staff. The Labour Act therefore applies unless the

15 Section 154(5).

16 Section 273(1)(d).

17 Section 259(10).

18 Section 188(2).

19 Section 190(4).

enabling legislation keeps the employees as civil servants. They cannot have their cake and eat it. If the legislation excludes the employees from the Civil Service, the Labour Act applies because there is no provision in the Constitution specifying their conditions of service. That means that, in the event of there being any provision in their relevant Acts or employment regulations inconsistent with the Labour Act, the latter prevails in terms of section 2A(3).

Where the Labour Act does not apply, there is always a piece of legislation applicable. The practice in Zimbabwe is that all pieces of legislation covering the various categories of employees not covered by the Labour Act follow the model of the Public Service Act and regulations made under it.

For illustrative purposes, the rest of this chapter focuses on the Civil Service.

Establishment and functions of the Civil Service

The Civil Service is established in terms of section 199 of the Constitution. It consists of persons employed by the State except (i) members of the security services; (ii) judges, magistrates and other persons presiding over courts, (iii) members of Commissions established by the Constitution, (iv) staff of Parliament, and (v) any other person whose office or post is stated by the Constitution or an Act of Parliament not to form part of the Civil Service.

The Constitution leaves it to an Act of Parliament to provide for the organization, structure, management, regulation, discipline and conditions of service of members of the Civil Service.²⁰ The current Act providing for these is the Public Service Act (Chapter 16:04).

There must always be a Minister responsible for the Civil Service, so the President is obliged to appoint such a Minister.²¹ No member of the Civil Service may obey an order that is manifestly illegal.²² In the exercise of their functions, members of the Civil Service must act in a non-partisan manner, may not further the interests of any political party or cause and must not violate the fundamental rights or freedoms of any person.²³

20 Section 199(3).

21 Section 201.

22 Section 200(2).

23 Section 200(3).

The Civil Service is administered by the Civil Service Commission, consisting of a maximum of seven members, all of whom are appointed by the President.²⁴ The functions of the Civil Service Commission include appointing qualified and competent persons to hold posts in the Civil Service, fixing and regulating conditions of service, including salaries, allowances and other benefits, and exercising control and disciplinary powers over members of the Civil Service.²⁵ More fundamentally, the Civil Service Commission has legislative powers to make regulations, with the approval of the Minister responsible for the Civil Service, for the purposes of any of its functions.²⁶ The current regulations are in SI 1/2000.

Collective bargaining and conditions of service in the Civil Service

The power of the Civil Service Commission to fix and regulate conditions of service, including salaries and allowances and other benefits, is made subject to section 65(5) of the Constitution.²⁷ This means that the Civil Service Commission must exhaust the collective bargaining framework before fixing any conditions of service. It has a duty to bargain in absolute good faith, but is not necessarily required to reach an agreement with the employees. To satisfy the requirements of section 65(5), before fixing terms and conditions, all it needs to show is that it engaged in genuine collective bargaining. Obviously, the failure to reach an agreement in a matter where it was reasonable to reach an agreement may be evidence of not having engaged in genuine collective bargaining. In that event, any terms and conditions fixed without such an agreement are a nullity.

In section 203(4) it is provided that:

In fixing the salaries, allowances and benefits of members of the Civil Service, the Civil Service Commission must act with the approval of the President given on the recommendation of the Minister responsible for finance and after consultation with the Minister responsible for the Civil Service.

This provision must be read in the light of section 65(5) which makes collective bargaining a fundamental right. At what point is the approval

²⁴ Section 202.

²⁵ Section 203.

²⁶ Section 203(2).

²⁷ Section 203 (1)(b).

of the President required? Is it after the conclusion of a collective bargaining agreement or in the course of the bargaining process? Since salaries, allowances and benefits are only fixed after collective bargaining, the President's role is that of the employer. The Civil Service Commission is a representative of the employer. It is an agent. The President represents the principal. The provision merely emphasizes that the Civil Service Commission has no mandate to reach an agreement on salaries, wages and benefits without the approval of the principal. This requires the Civil Service Commission to get the approval of the President before agreeing to any salaries, allowances and benefits. It must get its collective bargaining positions approved by the President before it enters into an agreement with the employees. Once an agreement is reached, there is no further requirement for the President's approval. The State is bound.

Formation and functions of trade unions in the Civil Service

The right to form and join trade unions of one's choice is entrenched in section 65 of the Constitution. Any group of employees in the Civil Service may form a trade union and participate in its lawful activities. There is no statutory scheme for the registration of trade unions in the Civil Service. In the absence of such a statutory scheme, every genuine trade union formed and operating in terms of its Constitution is entitled to operate and enjoy all rights and privileges of trade unions contemplated by section 65 of the Constitution. The scheme which existed prior to the coming into force of the Constitution of Zimbabwe, 2013 related to what were called 'staff associations'. This scheme is now unconstitutional and invalid.

Right to strike in the Civil Service

In terms of section 65(3) civil servants have a right to strike. Unlike employees governed by the Labour Act, civil servants are not subject to any of the restrictions discussed in Chapter 13, because there is not yet a law regulating the exercise of this right in the Civil Service. Even the restriction in respect of essential services requires a law to regulate its scope. In the absence of such a law, civil servants can rely directly on section 65(3) of the Constitution to go on strike. Until a law is passed, the courts will have to do their best to fashion a set of restrictions derived from the inherent characteristics of a right to strike.

Individual terms and conditions of employment

These are specified in SI 1/2000. The position is not substantially different from what has been discussed in Chapters 3 and 4.

Disciplinary proceedings

SI 1/2000 sets out a mandatory procedure in the event of suspected acts of misconduct. Any disciplinary action outside that procedure is a nullity.²⁸ The courts have emphasized the importance of rules of natural justice, particularly the *audi alteram partem* rule.²⁹ Thus, where it is considered that a civil servant should be suspended without pay, it is a requirement of the *audi alteram partem* rule that the employee be given an opportunity to reply to the allegations before being suspended.³⁰ Even at the enquiry stage, where the purpose is to make findings of fact, the *audi alteram partem* rule must be respected.³¹ However, the rule has no fixed content and varies with circumstances, so that in some cases written submissions may be sufficient.³² Because of the *audi alteram partem* rule, summary dismissal of striking civil servants is a nullity.³³ If an employee unreasonably fails to attend an inquiry, the rule is not violated if the inquiry proceeds without him or her and a decision made to his detriment.³⁴

The Civil Service Commission cannot use a circular as a basis for dismissal, such as providing in a circular that an employee would be deemed to have resigned in stated circumstances.³⁵ Employees must face disciplinary proceedings as provided for in the legislation.

Involvement of the Labour Court

28 *Harawa v Bosman N.O. & Anor* 1972 (2) RLR 118.

29 *Metsola v Chairman, Public Service Commission & Anor* 1989 (3) ZLR 147 (S); *Jiah & Ors v Public Service Commission & Anor* 1999 (1) ZLR 17 (S).

30 *Public Service Commission v Tsomondo* 1988 (1) ZLR 427 (S).

31 *Moyo v Secretary for the Justice, Legal and Parliamentary Affairs* 1998 (2) ZLR 185 (HC); *Metsola v Chairman, Public Service Commission & Anor* 1989 (3) ZLR 147 (S).

32 *Ibid.* See also *Chairman, Public Service Commission v Marumahoko* 1992 (1) ZLR 304 (S).

33 *Zimbabwe Teachers' Association v Minister of Education* 1990 (2) ZLR 48 (H); *Jiah & Ors v Public Service Commission* 1999 (1) ZLR 17(S).

34 *Chitzanga v Chairman, Public Service Commission & Anor* 2000 (1) ZLR 201(H).

35 *Muzenda v Public Service Commission & Anor* 2002 (2) ZLR 551 (H).

Section 26 of the Public Service Act provides for appeals to the Labour Court from any verdict reached or penalty imposed in terms of disciplinary proceedings under the Act. Access to the Labour Court is available to other categories of State employees outside the Civil Service.³⁶

³⁶ See for example section 19, Judicial Service Act and section 25, Audit Office Act.

SOME ASPECTS OF SOCIAL SECURITY

Introduction: What is social security?

Life has its well known realities and risks. Among the realities is the prevalence of the less privileged members of society being constantly in need of basic necessities in order to sustain even the barest minimum aspects of life. Chief among the risks of life is the loss of earning capacity as a result of old age, sickness, injury while at work or unemployment. Measures which are put in place to guarantee either the basic necessities of life for the less privileged or an income for all categories of persons affected by the risk of loss of earnings constitute the phenomenon known as social security. Social security therefore encompasses schemes or actions backed by the State which ensure that people have such protection.

A distinction is usually drawn between two main categories of social security, namely social insurance and social assistance. Social insurance is where persons are entitled to benefits only if they have previously contributed to a fund. This may also be termed *earned* social security. This is the typical social security for workers and their families. The contributions are normally compulsory and are shared by employers and employees. Social assistance refers to payments made by the State to individuals on the basis of need, and without them having contributed previously to any fund. The benefits are payable to certain categories of people living below a specific standard of living.¹ In general, the term 'social security' is used to cover both of these types and it is therefore important to be sure

1 See Martin Scheinin, 'The Right to Social Security', in Eide et al. (2001), p. 211; Basson et. al. (2009), p. 396.

in what sense the term is being used.

At the international level, social security is regulated by the ILO mainly through the Social Security (Minimum Standards) Convention 102 (1952). The convention lists the following nine categories of social security: medical care, sickness benefit, unemployment benefit, old-age benefit, employment injury benefit, family benefit, maternity benefit, invalidity benefit and survivor's benefit.

In Zimbabwe, there are two areas of social security which arise in labour law, namely compensation for work-related injuries and diseases, and pensions; each will be considered in turn.

Compensation for work-related injuries and diseases

It has been observed that virtually every country has a social security scheme providing for one or another form of compensation for work-related injuries, deaths and diseases.²

Zimbabwe has a statutory system for the payment of compensation for three work-related situations: injury, death and diseases. The main statutory system is provided for in terms of the National Social Security Authority Act [Chapter 17:04]. Part II of the Act provides for 'social security schemes'. Section 3(1) thereof states that:

... the Minister may, by notice in a statutory instrument, establish one or more schemes for the provision of benefits to or in respect of all employees or such classes of employees as may be specified in the notice, and may in like manner amend or abolish any such schemes.

Pursuant to this power, the Minister in 1990 established the Accident Prevention and Workers' Compensation Scheme. It was established by the National Social Security Authority (Accident Prevention and Workers' Compensation Scheme) Notice, 1990 (SI 68/1990).

Thus, the law covering compensation for work-related injuries, deaths and diseases is found, almost exclusively, in SI 68/1990. Its main features are easy to summarize. First, it abolishes any common law claims for damages which the employee may have.³

2 Piet Myburgh, 'Investigating Models to Provide and Sustain Adequate Long-Term Employment Injury Benefits in South Africa as a Developing Country, and the Extensions of such Models to those excluded', in Olivier and Kalula (2001).

3 Section 8 of SI 68/1990.

In other words, any employee or dependant to whom the scheme applies is not permitted to resort to the common law for compensation for work-related injuries, death or diseases. In specific terms, section 8 provides as follows:

From and after the 1st January, 1960 –

- (a) no action at common law shall lie by a worker or any dependant of a worker against such worker's employer to recover any damages in respect of an injury resulting in the disablement or death of such worker arising out of and in the course of his employment; and
- (b) no liability for compensation shall arise save under and in accordance with this scheme in respect of such disablement or death...

There is, however, an exception provided for in section 9 of SI 68/1990. If the accident is due to the negligence of the employer or a senior manager, or is caused by a patent defect in the condition of the premises or machinery, the worker may institute a common law action against the employer. This action can only be for additional compensation. It is not competent where the employee has not been, or will not be, paid compensation under the scheme.⁴ In *Ncube v Wankie Colliery Co & Anor*,⁵ the plaintiff's son was killed in a motor vehicle accident. The vehicle was being driven by another employee (a driver) in the course of his employment. The accident was due to the negligence of the driver. It was held that as the driver was not 'a person entrusted by his employer with the management' of the affairs of the business, section 9 did not apply and therefore no common law action was available.

In *Sibanda v Independence Gold Mining Zimbabwe (Pvt) Ltd & Anor*,⁶ the plaintiff was seriously injured in an accident at the mine where he worked. The accident was caused by the negligence of one of the junior employees, the second defendant. The plaintiff was being paid under the NSSA scheme but he sued his employer and the junior employee who caused the accident for damages and for pain and suffering. He claimed, as damages, the difference between what he was paid under the NSSA

4 Section 9(2) and (3) of SI 68/1990. See also *Ncube v Wankie Colliery Co & Anor* 2007 (1) ZLR 96 (H).

5 Ibid.

6 2003 (2) ZLR 155 (H).

scheme and what he would have earned over the same period had he not been injured. It was held that the plaintiff's cause of action had been abolished by the NSSA scheme. The common law action is not permissible. There is no liability for pain and suffering under the NSSA scheme. It was held further that the junior employee who caused the accident was not in management and therefore fell outside section 9 of SI 68/1990.

SI 68/1990 is a social insurance scheme. This is because the employer is obliged to make contributions to the Workers' Compensation Fund.⁷ Under the common law, it is the duty of the employer to provide safe working conditions. Workers do not make contributions to the Fund. Apart from employers' contributions, the fund may be supplemented by public funds.⁸

The prohibition of a common law action against the employer and, as a consequence, restricting work-related injuries, deaths and diseases to the statutory remedies, may be challenged as contravening the constitutional right to the equal protection of the law. In other words, why deny the employee the protection of the common law? While it is clear that the prohibition is a restriction on the right to the equal protection of the law, it is not, however, unconstitutional. The restriction passes the test in section 86 of the Constitution as being 'fair, reasonable, necessary and justifiable in a democratic society' when regard is laid to its purpose. The prohibition is a quid pro quo for compelling the employer to make contributions to the Workers' Compensation Fund. It is only fair that employers be protected from common law actions. The overall purpose of such a state of affairs is to promote the public interest in having an orderly, guaranteed and no-fault based compensation scheme for work-related injuries, deaths and diseases.⁹

The compensatory framework under the scheme has three obvious advantages not available under the common law. First, it is a no-fault scheme. The employee is not required to prove any fault on the part of the employer. All that is required is to prove injury, death or disease arising out of and in the course of employment. Secondly, in an action under the common law there is always the risk of the employer being finan-

7 Section 66 of SI 68/1990.

8 Section 69 of SI 68/1990.

9 The South African Constitutional Court has held that the prohibition of common law actions is justifiable and therefore not unconstitutional: *Jooste v Score Supermarket Trading (Pty) Ltd* 1999 (2) SA 1 (CC).

cially unable to pay the damages claimed. This risk is removed under the scheme, as payment is from the insurance fund. Thirdly, the scheme grants some benefits not available under the common law, such as to the dependants of employees killed as a result of a work-related accident or disease.

The common law action is only prohibited against the employer and not third parties. However, actions against third parties are regulated by section 10. NSSA has a right of action against the third party for the recovery of the compensation it is liable to pay under the Scheme.¹⁰ This right of NSSA has priority over the worker's right of action against the third party. A worker cannot opt out of compensation under the scheme and instead proceed against a third party. An action against a third party can only be instituted as additional to a claim for compensation under the scheme. Section 10(2) says:

No proceedings in a court of law to recover damages against any person referred to in subsection (1) may be taken by a worker until he has so notified the general manager of his intention to take proceedings and unless he has lodged a claim for compensation.

Without notice to the general manager of NSSA of an intention by a worker to commence proceedings in a court of law against a third party for damages, any such action so commenced is still-born and will be dismissed.¹¹

NSSA's right of action against the third party may be exercised either by intervening in proceedings instituted by the worker against the third party or by instituting separate proceedings.¹²

An employer may be granted an exemption from making contributions to the Fund based on assessments and proof that the employer has established and made provision for the maintenance of a fund for insurance against any liability which may arise in respect of all workers employed by it.¹³ An employer exempted in this way is described as 'an employer individually liable'.¹⁴ An exemption only relates to contributions to the

10 Section 10(1)(b).

11 *Santo v General Accident Insurance Co (Zimbabwe) Ltd* 1995 (1) ZLR 322 (S).

12 Section 10(1)(b) of SI 68/1990.

13 Section 76 of SI 68/1990.

14 Section 77 of SI 68/1990.

fund based on assessments and not to contributions towards the expenses incurred in the administration of the scheme.¹⁵

To qualify for compensation under the scheme, one must be a worker as defined in the notice.¹⁶ The definition of the 'dependants' of the worker is very wide and, where there is no widow or widower, includes 'any person with whom the worker was, in the opinion of the general manager, living as man and wife at the time of the accident.'¹⁷

Where a claim is based on an injury or death, this must be caused by an accident. An accident is defined in section 3 as 'an unlooked for mishap or untamed event or process of work arising out of and in the course of a worker's employment, which was not expected or designed by the worker and which results in injury to him'. The expression 'arising out of and in the course of' employment has been the subject of numerous judicial decisions. The general rule is that an accident is said to occur in the course of employment if it happens while the employee is performing his or her contractual duties.¹⁸ The facts of *Workers' Compensation Commissioner v FA Stewart (Pvt) Ltd*¹⁹ are worth noting to illustrate the two issues of 'accident' and 'course of employment'. The headnote reads:

In a special case stated ... it appeared that H, a white man and a 'worker' as defined by the Act, was employed as manager of a ranch in Matabeleland; that on the day in question in September 1987, during the course of his employment, H was engaged on the ranch sorting out cattle with fellow employees at a dip for a forthcoming inspection; that as he was so doing a lone gunman approached and, having ordered all the employees to lie on the ground, shot H and killed him instantly; that thereafter the gunman stole H's watch and keys and ordered the other employees to set fire to a truck belonging to the respondent; that the gunman did not rob or injure any of the other employees; that from 1983-1988 there was a so-called 'dissident activity' in Matabeleland, particularly the rural areas thereof, during which a number

15 Ibid.

16 Section 4 of SI 68/1990.

17 Section 5 of SI 68/1990.

18 See, for example, *Worker's Compensation Commissioner v F A Stewart (Pvt) Ltd* 1990 (2) ZLR 376 (S); *Minister of Justice v Khoza* 1996 (1) SA 410 (A).

19 Ibid.

of civilians, who were mostly black but who included certain white farmers, miners, farm or mine managers, were killed by dissidents.

Held, that on the probabilities, the gunman was a dissident.

Held, further, that the dissident's activity rendered the locality in which H had to work dangerous and that he was obliged by his employment to be where he was at the time of his death.

Held, further, that H's death arose out of his employment in the sense that his employment brought him within the range of the peril he encountered and, hence, that his death was 'an accident' as defined by the Act.

An employee does not cease to be in the course of employment merely on account of the fact that at the time of the accident he or she was acting contrary to any order of the employer.

If an accident is attributable to the serious and wilful misconduct of the worker it cannot be said to be 'not expected' and therefore no compensation is payable.²⁰ There is an exception to this. Despite being attributable to the serious and wilful misconduct of the worker, compensation is still payable where the accident results in 'serious disablement' or death.²¹

Where a worker dies more than twelve months after the accident, no compensation is payable unless it is proved that the accident directly caused the death or was the principal contributory cause of the death.²²

Section 28 of SI 68/1990 is very specific on prohibiting any contracting out. It says:

Save as is specifically provided in this scheme in respect of agreements, any provision in a contract existing on the 1st January, 1960, or thereafter entered into, whereby a worker or his dependants relinquish any right to compensation, whether for the worker or for any dependant, shall be null and void.

If a claim is based on contracting a disease, it must be shown that the disease is 'a scheduled disease' and was due to the nature of the worker's

20 Section 24(2) of SI 68/1990.

21 Ibid.

22 Section 24(2)(b) of SI 68/1990.

employment.²³ These two aspects can only be proven by the grant of a certificate by a medical practitioner.²⁴ A 'scheduled disease' is that specified in the second schedule to SI 68/1990.

Pensions

Black's Law Dictionary defines a pension as 'fixed sum paid regularly to a person (or to the person's beneficiaries) especially by an employer as a retirement benefit'.

It defines 'retirement' as: 'voluntary termination of one's own employment or career, especially upon reaching a certain age'.

These definitions are apt and underscore the essential features of a pension, namely (i) a regular payment (ii) to a person who has ceased being an employee on account of (iii) either old age or disability. Where a payment is not in regular instalments but is a lump sum, it cannot be a pension but something else such as a retrenchment package (or severance pay). There are two types of pension schemes available in Zimbabwe: a State pension scheme and private pensions.

State Pension Scheme

There is a compulsory pension scheme known as the Pensions and Other Benefits Scheme created by NSSA. It is established through the National Social Security Authority (Pensions and Other Benefits Scheme) Notice, 1993 (SI 393/1993), and requires compulsory contributions by both employers and employees to the fund set up in terms of the Notice.

Except for domestic workers, it covers all employees, including employees of the State. For every month in which an employee is employed, the employer and employee shall each be liable to contribute to the Pension and Other Benefits Fund an amount determined from time to time by the Minister.²⁵ An employer is obliged to deduct the employee's contributions from the earnings payable to the employee and pay them, together with the employer's own contributions, to the Fund.²⁶ Any person who has ceased to be an employee but had contributed for at least twelve months may continue to pay his or her contributions to the Fund as a 'voluntary contributor' provided he or she is under the age of 60 years.²⁷

23 Section 62(1) of SI 68/1990.

24 Ibid.

25 Section 19(1) of SI 393/1993.

26 Section 13(1) of SI 393/1993.

27 Section 16 of SI 393/1993.

In *Nyambirai v NSSA & Another*,²⁸ the State Pension Scheme faced a severe test. It was attacked as unconstitutional by a young lawyer employed by a firm of legal practitioners. He was a member of a private pension scheme which provided adequate security for himself and his family in the event of his retirement, disability or death. He contended that the compulsory contributions infringed section 16 of the Constitution which protect private property from compulsory acquisition. It was common cause that the compulsory contributions amounted to compulsory acquisition of property. What was in contention was whether or not this acquisition was permissible as being 'in satisfaction of a tax', and if so, whether it was 'reasonably justifiable in a democratic society'.

The first question for the court was to determine whether or not the contributions were a form of 'tax'. The court identified four essential requirements of a tax as follows: (i) it is a compulsory and not an optional contribution, (ii) it is imposed by the Legislature or other competent public authority, (iii) it is imposed upon the public as a whole or a substantial sector thereof (iv) the revenue from it is to be utilized for the public benefit and to provide a service in the public interest.

The applicant argued that the fourth requirement was lacking, since the benefits under the scheme only applied to members or their survivors. There was no direct benefit to members of the public in general. The court disagreed. It considered the social and economic policies which moved the Government to introduce a compulsory pensions scheme, and concluded that it was for the public benefit and was a service in the public interest. The main policy was to provide national social protection and this was manifestly in the public interest. The conclusion was therefore that the contributions were a 'tax'.

The second question was whether or not this form of tax was reasonably justifiable in a democratic society? The applicant contended that the scheme was unreasonable in that it did not take into account that some employees had their own private schemes or other arrangements which provided similar or even better benefits. The scheme therefore compelled such employees to be doubly insured. There was no reasonable justification for this double insurance.

The court disagreed again. It held that the legislative objective of establishing social security cover to a very large number of employees who

28 1995(2) ZLR 1 (S).

previously enjoyed no such coverage was sufficiently important to justify the imposition of a tax upon employees and employers. This was supported by the protection of the right to social security in international law. The compulsory nature of the scheme was designed to make it viable, as any optional framework 'would place the very existence and life-span of the scheme in jeopardy'.²⁹ The conclusion was that the tax was reasonably justifiable in a democratic society. This upheld the State Pension Scheme as constitutional.

There are seven benefits payable under the State Pension Scheme.³⁰ These are: (i) invalidity pension, (ii) invalidity grant, (iii) retirement pension, (iv) retirement grant, (v) survivor's pension, (vi) survivor's grant and (vii) funeral grant.

Invalidity pension and invalidity grant

This is payable to an employee who has not yet attained the age of 60 years, is considered permanently incapable of work as result of any disease or bodily or mental disablement and had made contributions for at least 60 months. An employee who is meeting the other conditions but has paid contributions for less than six months shall be entitled only to an invalidity grant instead.

Retirement pension and retirement grant

This is payable to an employee who has attained the age of 60 years and has retired from employment and has made contributions for at least 120 months. An employee who meets the other conditions but has contributed for less than 120 months is entitled to a retirement grant instead.

Survivor's pension

This is payable to the widow or widower or any dependant of a deceased who was entitled to either an invalidity or a retirement pension.

Survivor's grant

This is payable to the dependant of an employee who at the time of his or her death would have been entitled to an invalidity grant or retirement grant.

Funeral grant

This is payable in respect of a deceased who was in receipt of an inva-

²⁹ At p. 14G.

³⁰ Section 21 of SI 393/93.

lidity or retirement pension or who had made contributions for not less than 60 months.

The Public Service Scheme is compulsory for all persons employed full time in one of the Public Services. The benefits include (i) pension and (ii) a gratuity. A pension is payable where the employee's pensionable service is 10 years or more, while a gratuity is payable where the employees's pensionable service is less than ten years.

Private Pension Schemes

A private pension scheme is a matter of contract. There are two contracts involved. The first is the contract of employment which creates the right of the employee to a pension and the terms and conditions governing the employee's right to participate in a pension scheme. The second is the pension contract. This is the specific contract between the employee and the pension scheme itself. It defines the terms and conditions of entitlement to the benefits payable under the scheme. They may be embodied in the employment contract itself but it is always important to separate the two juristic relationships: the employment contract forms the basis of the pension contract.

An illustration is necessary to illuminate this point about the two separate juristic acts. Take the following clause appearing in a contract of employment:

You (the employee) will be required to join the company – assisted Pension and Group Life Assurance Schemes contributions to which amount to 6% of your monthly salary. In this connection, please supply our Personnel Department with a copy of your Birth and Marriage Certificates. Please note that the company contributes 16% of your monthly salary to your pension in addition to your own contribution. Please refer to the Pension Fund Booklet for further details.³¹

This is a typical approach. The employment contract makes it obligatory for the employee and employer to join, and contribute to, a pension fund. It defines the contribution levels. However, there is a distinct and separate contract between the employee and the pension fund which defines rights and duties relating to benefits. There are instances where an employee may not qualify to join the pension fund but remains an em-

31 Taken from the conditions of service in *Ritchie v Delta Pension Fund* 1992 (2) ZLR 413 (S) at p. 417.

ployee all the same. The existence of a separate contract is unavoidable, because a private pension scheme is a body corporate with a separate legal existence from the employer. In *Ritchie v Delta Pension Fund*,³² it was a term of the contract of employment that the employee joins the Delta Pension Fund. This depended on the employee's eligibility for membership. In terms of the rules of the Fund, no person was eligible to become a member after attaining the age of 55 years. The employee supplied false information relating to his age and was accepted as a member. He paid contributions to the Fund. It was realized after his death while processing his 'widow's pension', that he had not been eligible for membership. The pension contract was held to be invalid and the Fund was allowed to recover amounts paid as pension benefits to the widow in terms of the law of unjust enrichment.

The terms of the pension contract may be contained in a collective bargaining agreement binding on the employer and employee.

Private pension schemes are regulated by the Pension and Provident Funds Act [Chapter 24:09]. In terms of the Act, no person may establish a pension fund unless it is registered or provisionally registered.³³ On registration, a fund becomes a body corporate capable of suing and being sued in its corporate name and shall have assets, rights, liabilities and obligations pertaining to its business 'to the exclusion of any other person'.³⁴ Each fund shall have rules which must comply with such requirements as may be prescribed from time to time.³⁵ The current prescribed requirements for rules of pension funds are contained in the Pension and Provident Funds Regulations, 1991.³⁶ Any purported rule of a pension fund which is inconsistent with the Act or Regulations is void.

The Regulations have minimum rules on membership and benefits which must be complied with by every pension scheme. For example, every fund shall indicate whether it is a pension fund or a provident fund or a retirement annuity fund.³⁷ In addition, it must state whether it is an insurance company scheme or a self-administered fund.³⁸ Every fund

32 1992 (2) ZLR 413 (S).

33 Section 4 of the Act.

34 Section 6 of the Act.

35 Section 7 of the Act.

36 SI 323/1991.

37 Section 5 of SI 323/1991.

38 Ibid.

must be administered by trustees, and the rules of the fund must make provision for their appointment or election, their terms of office and their functions and powers.³⁹

There are three fundamental provisions imposed by the Regulations which affect the rights of employees to membership of pension schemes. Firstly, every employee on the full-time permanent staff of an employer who is below the age of 55 years has an automatic right to join a fund established for or covering employees of his or her employer.⁴⁰ Secondly, once an employee has joined a pension fund, he or she shall not be permitted to withdraw from membership as long as he or she is still an employee of a participating employer except if he or she becomes a member of another registered fund established for the benefit of employees of the same employer.⁴¹ Thirdly, the minimum retirement age is 55 years and the maximum is 70 years.⁴² A retirement age lower than 55 years must be approved by the Registrar of Pensions.⁴³

The nature of benefits payable on retirement varies from scheme to scheme. It is always a matter of interpretation of the rules of the pension fund to determine the nature of, and eligibility for, the benefits. Ordinary principles of interpretation apply. A common problem is where the rules of a pension fund purport to provide for the withholding of pension benefits of a member where a member has been dismissed from employment because of dishonest acts which have caused financial prejudice to the employer. Such withholding is only permissible where it has been approved by the Registrar of Pensions.⁴⁴ The Registrar cannot grant this approval in the absence of clear and convincing evidence.⁴⁵

Thus, expressions such as 'surviving spouse' must be given the meaning generally associated with them in the legal system.⁴⁶

Invariably, the rules of pension funds confer on the trustees 'sole ab-

39 Section 6 of the SI 323/1991.

40 Section 10 (1)(b) of SI 323/1991.

41 Section 10(3) of SI 323/1991.

42 Section 15 of SI 323/1991.

43 Ibid.

44 Section 52 of SI 323/91.

45 See *Liquidator, ZECO Ltd v Registrar, Pensions and Provident Funds & Ors* 2002 (2) ZLR 22 (S).

46 *Makwiramiti v Fidelity Life Assurance & Anor* 1998 (2) ZLR 471 (S). See also *Katiyo v Standard Chartered Zimbabwe Pension Fund* 1994 (1) ZLR 225 (H); *Zimnat Insurance Co. Ltd v Chawanda* 1990 (2) ZLR 143 (S).

solute discretion' to determine matters related to the administration of the fund, including the payment of benefits. This means that, in general, the trustees are the sole judges of all the matters which they have to consider. The courts may only interfere if it can be shown that the trustees considered the wrong question, or that although they purported to consider the right question they did not really apply their minds to it, or that they perversely shut their eyes to the facts, or that they did not act honestly or in good faith.⁴⁷

It is also common for the rules of pension funds to provide for reference to arbitration in the event of a dispute between the trustees and a member/beneficiary. In such cases, it is not every dispute which is subject to the arbitration clause; it must be a dispute over a matter provided for in the Rules.⁴⁸

47 *Finlayson v Standard Chartered Pension Fund Trustees* 1995 (1) ZLR 302 (H); *Dundee General Hospitals Board of Management v Walker & Anor* [1952] (1) A11 ER 896 at 904.

48 *Communications & Allied Industries Pensioners Association v Communications & Allied Industries Pension Fund* SC 29/2008.

INTERNATIONAL LABOUR LAW¹

What is International Labour Law?

It covers that part of labour law which has an international source. This includes both the substantive rules of law and the procedural rules governing the adoption and implementation of the international rules of labour law.

The sources of International Labour Law

The main sources are the instruments (Conventions and Recommendations) adopted by the International Labour Organisation (ILO).

However, international labour standards may also be found in other international and regional instruments, including:

- United Nations Universal Declaration of Human Rights (1948)
- United Nations Covenant on Civil and Political Rights (1966)
- United Nations Covenant on Economic, Social and Cultural Rights (1966)
- European Social Charter (1961)
- European Human Rights Convention (1950)
- Treaty of Rome (1954)
- African Charter on Human and Peoples Rights (1981)
- Southern African Development Community Treaty (1992)

In general, it is sufficient to concentrate on international labour law emanating from the ILO.

1 For further reading see N. Valticos and K. Samson, 'International Labour', in Blanpain and Engels (1993), p. 77; Sengenberger (2005); ILO (1996).

History of the ILO and its objectives

The ILO is an international organization which was established in 1919 by the Treaty of Versailles as a specialised agency of the League of Nations (the predecessor of the United Nations). It is thus a specialised agency of the United Nations.

At the Versailles Peace Conference of 1919, which was convened to end the First World War, trade unions requested that a Labour Commission be set up to ensure that their voices were heard and incorporated in the final settlement. It was the view of the trade unions that the improvement of working conditions was essential to the preservation of world peace. The 15-member Labour Commission included prominent labour leaders from France, Britain and Belgium.

The Labour Commission recommended that an organization be set up bringing together governments, employers and trade unions for the purpose of adopting a united set of actions in pursuit of social justice and better working conditions. The recommendation was adopted and became Part XIII of the Treaty of Versailles, which required the establishment of the ILO as a specialized agency of the League of Nations. At the first International Labour Conference in Washington in October 1919, six conventions were adopted, on: (1) Hours of Work (Industry); (2) Unemployment; (3) Maternity Protection; (4) Night Work (Women); (5) Minimum Age (Industry); (6) Night Work of Young Persons (Industry). It also adopted six Recommendations, on: (1) Unemployment; (2) Reciprocity of Treatment; (3) Anthrax Prevention; (4) Lead Poisoning (Women and Children); (5) Labour Inspection (Health Services) and (6) White Phosphorous.

The work of the ILO was interrupted by the outbreak of the Second World War in 1939. In 1944, towards the end of the war, a historic Conference was held in Philadelphia, which adopted a Declaration extending the ILO's work to cover not only labour legislation, but also economic and social policies such as employment, social security, nutrition and educational and vocational opportunities.

In 1946, the ILO became the first specialized agency of the United Nations. Its work has been uninterrupted since then. One of its responses to the challenges posed by globalization is encapsulated in the 1998 Declaration on Fundamental Principles and Rights at Work. The main objective of the Declaration is to insist on certain minimum standards in the

working environment whatever the arguments to the contrary proffered by proponents of globalization. These minimum standards are contained in 8 'Core Conventions' which every member of the ILO must respect.

Main tasks of the ILO

The main tasks of the ILO are to formulate and supervise the implementation of international labour standards. These were entrusted to the ILO in 1919 in the Treaty of Versailles in the following words:

*to establish everywhere humane conditions of labour
[and] to institute and apply a system of international
labour legislation.*

Its founding objectives are well stated in the Preamble to its Constitution, which proclaims the ILO's conviction that lasting peace can be founded only on the basis of social justice.

Fundamental principles guiding the ILO

- (a) Labour is not merely a commodity;
- (b) Freedom of association and of expression are essential to sustained progress;
- (c) Poverty anywhere constitutes a danger to prosperity everywhere;
- (d) Representatives of workers and employers should enjoy equal status with those of Government.

What is the purpose of international labour standards?

There has been debate as to the real purpose of international labour standards.² The following have been advanced as some of the purposes:

- (a) Promotion of fair international competition. Unregulated international competition could depress labour conditions and create hardships for workers. To prevent this, there must be a minimum floor of labour standards.
- (b) Contribution to the consolidation of peace. This is captured by the preamble to the ILO Constitution which states that:

² For a useful summary of the debate, see Sengenberger (2005), Chapter 3.

Universal and lasting peace can be established only if it is based on social justice ... conditions of labour exist involving such injustice, hardship and privation to large numbers of people producing unrest so great that the peace and harmony of the world are imperilled.

- (e) Achievement of social justice for its own sake.
- (f) Ensuring that economic development is guided by social considerations.
- (g) Source of inspiration for national action.

Those opposed to international labour standards have some of the following reasons:

- Improvement of labour conditions is determined by economic growth. International action to raise labour conditions is both futile and damaging.
- International labour standards distort the labour market.
- International labour standards are too costly.
- International labour standards are not effective.

Structure of the ILO

General Conference

The main feature of the ILO is its tripartite character. The General Conference is the decision-making body of the ILO, and comprises representatives of Government, workers and employers. Each country sends 4 representatives (2 Government, 1 trade union, 1 employer). It meets annually in June. This is the organ that adopts Conventions and Recommendations and admits new members.

Governing Body

This is the executive organ of the General Conference. It has the responsibility of co-ordinating all ILO activities, convening various meetings and deciding the agenda. It is elected every 3 years and has 56 members (28 Government, 14 employers and 14 trade unions).

International Labour Office

This is the permanent secretariat which coordinates ILO work and implements decisions, and is headed by a Director-General. It is based in Geneva and has several departments and offices across the world.

How are International Labour Standards created in the ILO

ILO standards are in two main forms, conventions and recommendations. Conventions are instruments designed to create legal obligations for the States which ratify them. Recommendations contain standards that are not meant to create legal obligations but are intended to encourage states to conform to the standards contemplated therein. Recommendations therefore give guidance as to policy, legislation and practice.

Article 19 of the ILO Constitution regulates the process of enactment of both instruments. It provides as follows:

- (1) When the conference has decided on the adoption of proposals to an item on the agenda, it will rest with the conference to determine whether those proposals should take the form: (a) of an International Convention or (b) of a Recommendation to meet circumstances where the subject, or aspect of it, dealt with is not considered suitable or appropriate at that time for a convention.
- (2) In either case, a majority of two-thirds of the votes cast by the delegates present shall be necessary on the final vote for the adoption of the Convention or Recommendation.

These provisions are supplemented by specific rules governing the conduct of business during sessions of the Conference and in meetings of the Governing Body. A reading of the ILO Constitution and the standing orders shows that the procedure is as follows:

- (a) In general, the ILO adopts what is called the ‘double-discussion procedure’. This means that an item on the agenda seeking to lead to a Convention or Recommendation is discussed at two sessions of the Conference. Only in exceptional cases is there a ‘single-discussion procedure’ – where discussion leading to the adoption or rejection of a proposed Convention or Recommendation is commenced and completed at one session.³
- (b) Before the first session that discusses a proposed Convention or Recommendation, the ILO office prepares a report on the law and practice in different coun-

3 See Article 34(4), (6) and (7) of the Standing Orders.

tries, together with a questionnaire, and sends this to the governments of ILO member countries. Each Government is requested to consult trade unions and employers' organizations before sending its response and comments. On receipt of the responses, the ILO office prepares a further report which takes into account the responses from governments. In this further report, the principal issues for consideration by the ILO Conference are set out. It is this report which is placed on the agenda of the Conference for the 'first discussion'.

- (c) At the relevant Conference where the 'first discussion' takes place, the principal issues are considered and the conference decides whether or not to have a Convention or Recommendation on the matters arising from the issues. It then adopts a position of either placing the matter on the agenda of its following session (for a 'second discussion') or leaving it to the Governing Body to include it on the agenda of a future session (still for a 'second discussion').
- (d) On the basis of the 'first discussion' in the Conference, the ILO office drafts a Convention or Recommendation, as the case may be, and sends the Draft to governments. The latter are, in turn, requested to consult trade unions and employers' organizations before suggesting amendments and making comments.
- (e) On receipt of the suggested amendments, the ILO office prepares a final report containing the amended text of the Convention or Recommendation, and this is communicated to governments before the relevant session of the Conference at which the 'second discussion' will take place.
- (f) At the relevant session of the Conference, the 'second discussion' takes place and this is usually based on the amended draft prepared by the ILO office. Each clause of the draft is presented for adoption. After the adoptions, the drafts are referred to the Drafting Committee for preparation of the final texts which

are brought back to the Conference for final adoption before the end of that session. It is at this final adoption that the provisions of Article 19 of the ILO Constitution have to be adhered to (that is, adoption is by two-thirds majority).

- (g) If a Convention fails to obtain the necessary two-thirds majority but gains a simple majority, the Conference may decide to refer it to the Drafting Committee for re-drafting.
- (h) In many cases, the Conference works in committees with the whole plenary only sitting to consider recommendations from its committees. For example, the plenary of the whole Conference may reject a Convention recommended by a committee and refer the matter back to the committee with an order for transformation into a Recommendation.

Ratification and coming into force of Conventions

Once a Convention has been adopted by the Conference, it must be communicated to all member states for ratification. Each member State is obliged, within one year of the adoption, and in exceptional cases not later than 18 months after the adoption, to submit an adopted instrument to its competent authorities. This obligation of a member State does not imply any obligation of the Government to recommend ratification or implementation of the instrument in question. The competent authority of each State is determined by the Constitution of that State. If the competent authority ratifies a Convention, this fact must be communicated to the Director-General of the ILO. There is no specific format of a ratification: each State follows its own constitutional law and practices. However, for the ratification to be registered, it must clearly identify the Convention being ratified and be on an original document duly signed by the designated official of the State (such as the President or Prime Minister or Minister of Foreign Affairs)⁴ Some Conventions require the instrument of ratification to contain a declaration relating to certain obligations therein.⁵ Where this is the case, the ratification cannot be registered if it is not accompanied by the declaration.

⁴ See ILO (2102) paragraph 19.

⁵ For examples, see Convention No 173, article 3(1), Convention 138, article 2.

The coming into force of a Convention is specified in the provisions of the Convention itself. The most common provision is for a Convention to come into force twelve months after its ratification.

Apart from Conventions and Recommendations, there is a third instrument called a Protocol, but this is rarely used. A Protocol is a binding instrument which is designed to complement or revise a Convention. It can only be ratified or complemented by a State which is simultaneously ratifying the Convention and the Protocol. Examples of Protocols are (i) Protocol of 1990 to Convention No. 89: Night work (women) Revised, 1948, and (ii) Protocol of 1982 to Convention No 100: Plantations, 1958.⁶

ILO standards are merely minimum standards. This is emphasized by Article 19(8) of the ILO Constitution which provides:

In no case shall the adoption of any Convention or Recommendation by the Conference, or the ratification of any Convention by any Member, be deemed to affect any law, award, custom or agreement which ensures more favourable conditions to the workers concerned than those provided for in the Convention or Recommendation.

Enforcement and supervision of international labour standards

The supervision of ILO standards is done by the examination of periodical reports and the submission of complaints.

Examination of periodical reports

Every member State of the ILO is obliged to make periodic reports on the measures it has taken to implement Conventions which it has ratified. Reports are normally requested at intervals of 2 or 5 years. Countries are also required to submit an annual report on the effect given to particular unratified Conventions. Furthermore, states are required to submit newly adopted Conventions and Recommendations to the competent authorities and must report to the ILO on whether or not this has taken place. It is a requirement that copies of all these reports be given to the organizations representing employers and workers, in particular where a country has ratified the Tripartite Consultation (International Labour Standards) Convention, 1975 (No. 144).

6 See ILO (2012), paragraph 23.

The examination of the reports is done by two ILO bodies:

- (a) The Committee of Experts on the Application of Conventions and Recommendations
- (b) The Committee on the Application of Standards of the International Labour Conference (the 'Conference Committee').

The Committee of Experts is composed of independent individuals with high qualifications in the legal and social fields. Its task is to study the reports and to assess the extent to which a State is complying with its ILO obligations. The committee's comments take one of two forms: either an *observation* of any shortcomings, which are published in its report to the International Labour Conference, or a *direct request* to the Government concerned to reply to any concerns raised by the committee.

The tripartite conference committee is elected annually at the International Labour Conference. Its task is to study the comments of the Committee of Experts and invite the respective governments concerned to respond. The committee then produces a report, which is discussed in the General Conference.

The trade unions and employers' organizations may utilise these procedures by submitting their own comments on the reports made by governments in respect of the application of a Convention. Such comments will be used by the respective committee in assessing the conformity of the State to ILO standards. Secondly, worker delegates at the Conference may raise further concerns during debate on the report submitted by the Conference committee on the application of Conventions or Recommendations.

Generally, a country's first two reports to the ILO on ratified Convention are required to be detailed and the typical form of the report is as follows:

- Laws and regulations: The report should list all relevant legislation and supply copies where relevant.
- Exceptions and limitations: It should be stated whether or not some categories of workers or economic activities are excluded from the legislation.
- Implementation of the Convention: Explanations should be given about how the provisions of the Convention are to be implemented.

- Effect of ratification: The report should indicate the legal steps required to make the Convention effective.
- Authorities responsible for enforcement: It should be indicated which national authorities are responsible for the enforcement of the legal provisions implementing the Convention.
- Judicial and administrative decisions: Where the courts have made decisions which affect the implementation of the Convention, this should be indicated.
- Observations by employers' and workers' organizations: A copy of the observations made by workers and employers should be attached and, where relevant, Government's response thereto should also be attached.
- Communication of copies of reports to workers' and employers' organizations: The report should indicate the names of the organizations to which copies of the report have been sent.
- Comments by supervisory bodies: Where the ILO's supervisory bodies have already made relevant comments, the report should indicate the extent to which any corrective measures have already been taken.
- General assessment; The report should carry a section where Government gives a general assessment of how the Convention is being applied and enforced.

The ILO Governing Body adopts standard report forms for each of the Conventions and reporting procedures, which assist countries in drawing up reports.

Complaints procedures

There are two kinds of complaints which may be made to the ILO, *complaints* and *representations*.

Complaints

The complaint procedure is the most formal in the ILO system. A complaint may be filed by one member State against another over non-compliance with a Convention which both have ratified, or it may be filed by the Governing Body of the ILO on its own account (*mero motu*) or on receipt of a complaint from a delegate to the General Conference. Thus, if a trade union wishes to file a complaint, it should be submitted to the Governing Body via, for example, a worker delegate to

the conference. This simply means that the trade union sends its complaint through its representative to the ILO. However, there is nothing to stop a trade union in country A raising its complaint through a worker delegate from country B.

Once a complaint has been filed, the Governing Body usually appoints a Commission of Inquiry to make a thorough investigation of the matter and make appropriate recommendations. States are expected to accept the recommendation unless they refer the matter to the International Court of Justice.

Representations

A representation may be made by an employers' or workers' organization on the basis that a State has failed to observe effectively a Convention it has ratified. The representations can be made at any time to the Governing Body and the rules require that they be considered in the first instance by a committee of 3 members of the Governing Body and thereafter by the whole body.

When a representation has been made, the following is what the standing orders of the ILO say:

- The Secretariat acknowledges receipt of the representation.
- The Government concerned is immediately informed.
- The matter is brought before the officers of the Governing Body, who in turn, report to the Governing Body on, whether or not the representation is 'receivable'. A representation is 'receivable' if:
 - it is communicated to the ILO in writing; and
 - it has been made by an organization of workers or employers; and
 - it is made in terms of Article 2 of the ILO Constitution; and
 - it concerns an ILO member State; and
 - it refers to a Convention which the member State has ratified; and
 - it makes clear in what way the Convention has been allegedly contravened.
- The body that has examined the matter reports back to the Governing Body giving its findings and recommendations on

the matter. However, the Government concerned is invited to be represented in the deliberations in the Governing Body on the matter.

Special Procedure Regarding Freedom of Association

Although the above procedures are available for trade unions for enforcing ILO standards, an additional method exists, but only for matters affecting freedom of association. The complaint must be in writing, signed and supported by proof of the alleged infringements. The organization filing the complaint should be either a national organization or an international organization which has consultative status with the ILO. The advantage of this special procedure is that it can be used even against a State which has not yet ratified the relevant freedom of association Convention.

Complaints under this procedure may be made by an employers' or workers' organization. The complaint is referred to the Committee on Freedom of Association, which makes recommendations to the Governing Body. Complaints may also be referred to the Fact-Finding and Conciliation Commission appointed by the Governing Body to deal with certain complaints. Trade unions have a right to substantiate the complaint in submissions to either the Committee on Freedom of Association or the Fact-Finding and Conciliation Commission.

How does international labour law become part of the law of Zimbabwe?

For an ILO Convention to become part of the law of Zimbabwe, it must be ratified. The 1980 Constitution, section 111B (1), provided as follows:

Except as otherwise provided by this Constitution or by or under an Act of Parliament, any convention, treaty or agreement acceded to, concluded or executed by or under the authority of the President with one or more foreign states or governments or international organizations

- (a) shall be subject to approval by Parliament, and
- (b) shall not form part of the law of Zimbabwe unless it has been incorporated into the law by or under an Act of Parliament.

The current constitutional provision is now contained in section 327

which provides as follows:

(1) In this section –

‘international organization’ means an organization whose membership consists of two or more independent States or in which two or more independent States are represented;

‘international treaty’ means a convention, treaty, protocol or agreement between one or more foreign States or governments or international organizations.

(2) An international treaty which has been concluded or executed by the President or under the President’s authority –

(a) does not bind Zimbabwe until it has been approved by Parliament; and

(b) does not form part of the law of Zimbabwe unless it has been incorporated into the law through an Act of Parliament.

(3) An agreement which is not an international treaty but which –

(a) has been concluded or executed by the President or under the President’s authority with one or more foreign organizations or entities; and

(b) imposes fiscal obligations on Zimbabwe;

(c) does not bind Zimbabwe until it has been approved by Parliament.

(4) An Act of Parliament may provide that subsections (2) and (3) –

(a) do not apply to any particular international treaty or agreement or to any class of such treaties or agreements; or

(b) apply with modifications in relation to any particular international treaty or agreement or to any class of such treaties or agreements.

(5) Parliament may by resolution declare that any particular international treaty or class of international treaties does

not require approval under subsection (2), but such a resolution does not apply to treaties whose application or operation requires –

- (a) The withdrawal or appropriation of funds from the Consolidated Revenue Fund: or
 - (b) any modification of the law of Zimbabwe.
- (6) When interpreting legislation, every court and tribunal must adopt any reasonable interpretation of the legislation that is consistent with any international convention, treaty or agreement which is binding on Zimbabwe, in preference to an alternative interpretation inconsistent with that convention, treaty or agreement.

It is permissible for an Act of Parliament to provide that ILO Conventions and other international treaties on labour shall automatically form part of the law of Zimbabwe without approval by Parliament and incorporation through an Act of Parliament. This is the meaning of subsection (4). No such Act of Parliament exists, so the position remains that both approval and incorporation through an Act are required for an international treaty on labour law to be part of the law of Zimbabwe.

Where an ILO Convention or any other international treaty on labour has been ratified but not incorporated through an Act of Parliament, it may form part of the law of Zimbabwe via interpretation within the contemplation of subsection (6). This is a real avenue through which international labour law contained in ratified ILO Conventions becomes part of the law of Zimbabwe. It must be noted, however, that subsection (6) only arises where the ILO Convention has been ratified by Parliament. It is only through such ratification that an international treaty can be ‘binding on Zimbabwe’. Subsection (6) only applies where the international treaty is ‘binding on Zimbabwe’. Subsection (2) makes it clear that Zimbabwe is only bound by an international treaty after approval by Parliament.

An ILO Convention or an international treaty on labour issues which has not been ratified is not irrelevant. The ILO Convention or international treaty may be referred to by the courts under general principles of statutory interpretation.

Finally, there is the issue of customary international law. Section 326 of the Constitution provides that:

- (1) Customary international law is part of the law of Zimbabwe, unless it is inconsistent with this Constitution or an Act of Parliament.
- (2) When interpreting legislation, every court and tribunal must adopt any reasonable interpretation of the legislation that is consistent with customary international law applicable in Zimbabwe, in preference to an alternative interpretation inconsistent with that law.

An ILO Convention or an international treaty on labour issues, whether ratified or not, may form part of the law of Zimbabwe if it is regarded as either evidence or codification of customary international law.

The above constitutional provisions do not necessarily make international law part of the law of Zimbabwe ahead of clear provisions of an Act of Parliament. Patel JA made this point in *Kundai Magodora & Ors v Care International Zimbabwe*.⁷

*I do not think that the courts are at large, in reliance upon principles derived from international custom or instruments, to strike down the clear and unambiguous language of an Act of Parliament. In any event, international conventions or treaties do not form part of our law unless they are specifically incorporated therein, while international customary law is not internally cognizable where it is inconsistent with an Act of Parliament.*⁸

The constitutional position on international law is not unique to Zimbabwe. Section 231(2) of the South African Constitution provides as follows:

An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and National Council of Provinces.

In section 231(4) it further provides, ‘Any International agreement becomes law in the Republic when it is enacted into law by national legislation.’

Article 144 of the Namibian Constitution states that, ‘Unless otherwise provided by this Constitution or an Act of Parliament, the general rules

⁷ SC24/2014.

⁸ At p. 6.

of Public International Law and International Agreement binding upon Namibia under this Constitution shall form part of the law of Namibia.’

In Malawi, section 211 (1) of the Constitution provides as follows:

- (1) Any international agreement ratified by an Act of Parliament shall form part of the law of the Republic if so provided for in the Act of Parliament ratifying the agreement.

In Ghana, section 75 of the Constitution provides as follows:

- (1) The President may execute or cause to be executed treaties, agreements or conventions in the name of Ghana.
- (2) A treaty, agreement or convention executed by or under the authority of the President shall be subject to ratification by:
 - (a) an Act of Parliament; or
 - (b) a resolution of Parliament supported by the votes of more than one-half of all the members of Parliament.

It appears clear that in terms of the Constitution of Zimbabwe, an Act of Parliament purporting to incorporate an ILO Convention must say so unambiguously. In *Communications & Allied Services Workers' Union Zimbabwe v Zimpost & Minister of Public Service*,⁹ it was argued in the Labour Court that by virtue of section 2A of the Labour Act, Conventions of the ILO were part of our law. On this basis, it was sought to utilize Conventions 87 and 98. Four members of the Labour Court sat. They rejected the argument and held that section 2A only gave guidance regarding interpretation of the provisions of the Act. This is what the Labour Court said:

The legal position is that for International Labour Organisation Conventions and other international instruments to be part of our domestic law they need not only to be ratified but be specifically incorporated as part of our domestic law. Section 2A does not, in our opinion, incorporate any convention. It merely stresses that in interpreting or construing provisions of the Act, this shall be done in a manner that best ensures the attainment of its objectives.

9 LC/H/180/2004.

This suggests that the incorporating Act must refer to the Convention by name. This is the practice with other international agreements, e.g. the Arbitration Act, 1996 which incorporates the international law on arbitration. Courts in Zimbabwe are entitled to refer to interpretations made by foreign courts or tribunals on similarly worded provisions. An interpretation, once made by our courts, becomes part of our law. This was stated by Dumbutshena CJ in the case of *S v A juvenile*:¹⁰

The courts of this country are free to import ... interpretations of similar provisions in international and regional human rights instruments ... in the end international human rights norms will become part of our domestic human rights jurisprudence.

The court will not be incorporating the international instrument. It will merely be interpreting domestic law. This is dependent on the nature of the judiciary. A labour friendly court may utilize this avenue to apply international labour standards through the interpretation of individual clauses of the Labour Act.

ILO Conventions are interpreted by the committee of experts and a body of law has arisen from the interpretations. This body of law still has to be recognized by domestic courts under the approach in *S v A juvenile* (*supra*). Apart from the use of ILO Conventions as persuasive sources in the interpretation of legislation, the courts may use them as evidence of an international practice which may be relevant in a given situation. This is best illustrated by the case of *Nyambirai v NSSA & Anor*.¹¹ In that case, Nyambirai sought to challenge the constitutionality of the compulsory pension scheme administered by NSSA. He argued that the imposition of a compulsory levy contravened section 16 of the Constitution in that it amounted to compulsory acquisition without compensation. He also argued that the compulsory levy was not a tax as provided for under section 16. The argument by NSSA was that even if it were an infringement of section 16, it was permissible by the Constitution as being 'reasonably justifiable in a democratic society'. NSSA relied on ILO Conventions to demonstrate an international practice where compulsory social security is the norm. It cited no less than 20 Conventions. The court accepted this approach and held that the fact that the ILO recognized compulsory so-

10 1989 (2) ZLR 61 (S)

11 1995 (2) ZLR 1 (S)

cial security meant that the NSSA scheme was ‘reasonably justifiable in a democratic society’.

From the above discussion on the use of international labour law in Zimbabwe, it appears there are five main roles of international law:

- (i) Where international law is incorporated into law by an Act of Parliament. Although reference will be to the incorporating Act, the law is essentially international law.
- (ii) Where a labour dispute is resolved by the direct use of international law. This is the case where the direct use of international law overrides a rule of common law in terms of section 326 of the Constitution. International law cannot override a statute, so the only direct use ahead of domestic law is where it is overriding the common law.
- (iii) Where international law is used as a guide to interpreting domestic law in terms of sections 46(1)(c), 326(2) and 327(6) of the Constitution. Here, the rule that settles the labour dispute is in domestic law but the rule is given its content and scope from a consideration of international law.
- (iv) Where the court establishes a jurisprudential principle based on international law to develop the common law in terms of section 46(2) or section 176. International law is used as the basis of either ‘the interests of justice’ or ‘the spirit’ of the Constitution.
- (v) Where reference to international law is to strengthen a decision based on domestic law. Here the labour dispute could be settled on the basis of domestic law alone but the reference to international law is to put the matter beyond doubt by giving an alternative or corroborative basis.¹²

12 This summary is adapted from ‘Use of international law by domestic courts: compendium of court decisions’ (2011). Turin: International Training Centre of the ILO. p.4

Three specific examples of international labour standards

Equality

Equality has been recognized and given expression by numerous international instruments. The 1948 UN Declaration of Human Rights provides as follows in Article 2: ‘Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’. This is taken further by the International Covenant on Civil and Political Rights.¹³ In the International Covenant on Economic, Social and Cultural Rights, the states who are parties to it are obliged to promote the principle of equality.¹⁴ There are also international instruments which prohibit discrimination on specific grounds, such as the 1965 UN Convention on Elimination of All Forms of Racial Discrimination and the 1981 UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). The ILO’s founding Constitution refers to the principle of equality, and this was reaffirmed in the 1944 Declaration of Philadelphia and subsequently incorporated in the Constitution. Conventions 100 and 111 are on equality.

Freedom of association

Freedom of association is a key pillar of the ILO and is thus embodied in the ILO Constitution itself. Two core Conventions deal with freedom of association, the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98). The former provides that workers and employers, without distinction, shall have the right to establish and to join organizations of their own choosing without previous authorization. The latter takes freedom of association further by providing for the protection of workers and trade union leaders against interference and anti-union discrimination; it also promotes voluntary collective bargaining.

Termination of employment

ILO standards on termination of employment are contained principally

¹³ Article 2(1).

¹⁴ Articles 2 and 3.

in Convention 158, which regulates termination at the instance of the employer and is designed to ensure that arbitrary dismissals are avoided. It is the foundation stone for the law on unfair dismissal in many countries. Its main principle is that the 'employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.'¹⁵ It lists a number of reasons it regards as invalid,¹⁶ including (i) union membership or participation in union activities outside working hours, or, with the consent of the employer, within working hours, (ii) being a trade union leader or a workers' representative, (iii) filing of a complaint against an employer for violation of laws, (v) race, colour, sex, marital status, family responsibility, pregnancy, religion, political opinion, national extraction or social origin, and (vi) temporary absence from work because of illness or injury.

If a termination is contemplated for reasons related to the worker's conduct or performance, the worker must be provided an opportunity to defend himself or herself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity.¹⁷ A worker who considers that his or her employment has been unjustifiably terminated shall be entitled to appeal against that termination to an impartial body.¹⁸ The main remedy for an unfair dismissal is reinstatement, but where this not practicable, it will be in the form of payment of adequate compensation or such other relief as may be deemed appropriate.¹⁹ The law must provide adequate terminal benefits, which must include a severance allowance.²⁰ In cases of retrenchment, the law must provide for consultations with workers' representatives in good time, and for the involvement of competent authorities.²¹

15 Article 4.

16 Article 5 and 6.

17 Article 7.

18 Article 8.

19 Article 10.

20 Article 12.

21 Articles 13 and 14.

APPENDICES

Part 1

Fundamental (core) ILO Conventions

Convention No. Title and Aim of Convention

- | | |
|-------------|--|
| 29 of 1930 | Forced Labour Convention (1930)

Requires the suppression of forced or compulsory labour in all its forms. Certain exceptions are permitted, such as military service, convict labour properly supervised, and emergencies such as war, fire and earthquake. |
| 87 of 1948 | Freedom of Association and Protection of the Right to Organize Convention (1948)

Provides for protection against anti-union discrimination, and for protection of workers' and employers' organizations against acts of interference by public authorities. |
| 98 of 1949 | Right to Organize and Collective Bargaining Convention (1949)

Provides for protection against anti-union discrimination, for protection of workers' and employers' organizations against acts of interference by each other and for measures to promote collective bargaining. |
| 100 of 1951 | Equal Remuneration Convention (1951)

Calls for equal pay and benefits for men and women for work of equal value. |
| 105 of 1957 | Abolition of Forced Labour Convention (1957)

Prohibits the use of any form of forced or compulsory labour as a means of political coercion or education, or as punishment for participation in strikes. |

111 of 1958 **Discrimination (Employment and Occupation) Convention (1958)**

Calls for a national policy to eliminate discrimination in access to employment and training on the grounds of race, colour, sex, religion, political opinion, national extraction or social origin, and to promote equality of opportunity and treatment.

138 of 1973 **Minimum Age Convention (1973)**

Aims at the abolition of child labour, stipulating that the minimum age for admission to employment shall not be less than the age of completion of compulsory schooling.

182 of 1999 **Worst Forms of Child Labour Convention (1999)**

Calls for immediate and effective measures to prohibit and eliminate the worst forms of child labour, including all forms of slavery, the use of child labour for prostitution, pornography or illicit activities, and work harmful to the health, safety or morals of children.

Part 2

Conventions ratified by Zimbabwe (as at 30 June, 2014)

Total number: 26

Fundamental (Core) Conventions: 8 of 8

Governance Conventions: 3 of 4.

Technical Conventions: 15 of 177.

The full profile of Zimbabwe's ratification of ILO Conventions is:

Convention No.	Table of Conventions	Ratification Date
Convention 14	Weekly Rest (Industry) 1921	06.06.80
Convention 19	Equality of Treatment (Accident Compensation) 1925	06.06.80
Convention 45	Underground Work (Women) 1935	06.06.80
Convention 100	Equal Remuneration 1935	04.12.89
Convention 144	Tripartite Consultation (International Labour Standards) 1976	14.12.89
Convention 26	Minimum Wage-Fixing Machinery 1928	16.09.93
Convention 81	Labour Inspection 1947	16.09.93
Convention 99	Minimum Wage Fixing Machinery (Agriculture) 1951	16.09.93
Convention 129	Labour Inspection (Agriculture) 1969	16.09.93
Convention 98	Right to Organize and Collective Bargaining 1949	27.08.98
Convention 29	Forced Labour 1930	27.08.98
Convention 105	Abolition of Forced Labour 1957	27.08.98
Convention 135	Workers' Representatives 1971	27.08.98
Convention 140	Paid Educational Leave 1974	27.08.98
Convention 150	Labour Administration 1978	27.08.98
Convention 159	Vocational Rehabilitation and Employment (Disabled Persons) 1983	27.08.98
Convention 170	Chemicals 1990	27.08.98

Convention No.	Table of Conventions	Ratification Date
Convention 111	Discrimination (Employment and Occupation) 1958	23.06.99
Convention 138	Minimum Age 1973	06.06.2000
Convention 182	Elimination of Worst Forms of Child Labour 1999	11.12.2000
Convention 87	Freedom of Association and Protection of the Right to Organize 1948	09.04.2003
Convention 155	Occupational Safety and Health 1981	09.04.2003
Convention 161	Occupational Health Services 1985	09.04.2003
Convention 162	Asbestos 1986	09.04.2003
Convention 174	Prevention of Major Industrial Accidents 1983	09.04.2003
Convention 176	Safety and Health in Mines 1995	09.04.2003

THE CASE LIST

ZIMBABWE

A

<i>African Gold Zimbabwe (Pvt) Ltd v A Dube and Others</i> SC 42/2004	222
<i>Agribank v Machingaiya & Anor</i> 2008 (1) ZLR 244 (S)	395
<i>Agricultural Labour Bureau and Anor v Zimbabwe Agro-Industry Workers' Union</i> 1998 (2) ZLR 196 (S)	293
<i>Agrifoods v J. Chiruka & Ors</i> SC 50/2003	140
<i>Air Zimbabwe Corporation v Mlambo</i> 1997 (1) ZLR 220 (S)	185
<i>Air Zimbabwe (Pvt) Ltd vs Chiku Mnensa & Anor</i> SC 89/2004	402
<i>Almin Metal Industries Limited v Hardon Chinowaita</i> SC 8/2003	156
<i>Ambali v Bata Shoe Co. Ltd</i> 1999 (1) ZLR 417 (S)	252, 253
<i>Anele Dube and One Hundred sixty-seven others v Unifreight Limited and The Minister of Labour and Social Welfare</i> SC 101/1999	455, 463
<i>ANZ Grindlays Bank (Zimbabwe) (Pvt) Ltd v Hungwe</i> 1994 (2) ZLR 1 (S)	422
<i>Art Corporation Ltd v Moyana</i> 1989 (1) ZLR 304 (S)	66, 108, 232, 234
<i>Art Printers Ltd v The Regional Hearing Officer and Joaquim Moyana</i> HH 168/1987	409, 411, 413
<i>Astra Industries Limited v Peter Chamburuka</i>	

<i>SC 27/2012</i>	179
<i>Augustine M. Tirivangani v University of Zimbabwe</i>	
<i>SC 21/2013</i>	118, 358, 401
<i>Austin Muroyiwa v Delta Operations Limited SC 83/2000</i>	189
<i>Automotive & Allied Workers' Union v Motor Trade Workers' Union 2006 (1) ZLR 495 (S)</i>	294, 295

B

<i>Banc ABC v Ruwo Hamadziripi LC/H/549/2013</i>	339
<i>Bank of Credit and Commerce Zimbabwe Ltd v Shepherd Chigwada SC 116/1995</i>	420
<i>Barclays Bank of Zimbabwe Limited v Fortune Ncube SC 26/2009</i>	162
<i>Barclays Bank of Zimbabwe Limited v Prize Mahachi SC 62/2004</i>	400
<i>Barclays Bank of Zimbabwe Limited v Shepherd Ndiraya SC 72/2005</i>	396
<i>Barclays Bank Zimbabwe Ltd v Mahachi 2004 (2) ZLR 126 (S)</i>	191
<i>Barry Thomas Prosser and 35 others v ZISCO HH 201/1993</i>	210
<i>Beazley NO v Kabell & Anor 2003 (2) ZLR 198 (S)</i>	385
<i>Benson Samudzimu v Dairibord Holdings Ltd HH 204/2010</i>	374
<i>Bevcorp (Pvt) Ltd v Nyoni & Ors 1992 (1) ZLR 352 (S)</i>	66
<i>Beverley Building Society v Minister of Labour 2002 (2) ZLR 241 (H)</i>	217
<i>BHP Minerals Zimbabwe (Pvt) Ltd v Takawira 1999 (2) ZLR 77(S)</i>	246, 271
<i>Biti v Minister of State for Security 1999 (1) ZLR 165 (S)</i>	81
<i>Blue Ribbon Foods Limited v Dube NO & Anor 1993 (2) ZLR 146 (S)</i>	351
<i>Book v Davidson 1988 (1) ZLR 365 (SC); 1989 (1) SA 638 (ZS)</i>	60, 178
<i>Brake and Clutch (Pvt) Ltd v Jolify Nyama SC 42/2001</i>	166

<i>Business Equipment Corporation v Mtetwa</i> 2007 (2) ZLR 43 (S)	143
---	-----

C

<i>C. Muchenje and 15 others v Stuttafords Removals (Pvt) Ltd</i> HH 374/2013	369, 372
<i>CABS v Rungwete</i> 2009 (2) ZLR 26 (S)	178, 188
<i>Caltex Oil (Zimbabwe) (Pvt) Ltd v Mutsvangwa</i> SC 95/1993	236
<i>Cargo Carriers (Pvt) Ltd v Zambezi & Ors</i> 1996 (1) ZLR 613 (S)	117, 186/7, 413, 417, 454
<i>Catering Employers Association of Zimbabwe v Zimbabwe Hotel and Catering Workers' Union</i> HH 206/2000	335, 359, 360
<i>Catering Employers Association of Zimbabwe v Zimbabwe Hotel and Catering Workers' Union and Anor</i> 2001 (2) ZLR 388 (S)	361, 382
<i>Chairman of the Public Service Commission & Anor v Marumahoko</i> 1992 (1) ZLR 304 (S)	247, 486
<i>Chairman, Public Service Commission & Ors Zimbabwe Teachers' Association & Ors</i> 1996 (1) ZLR 637 (S)	478
<i>Chambe v Rufaro Marketing (Pvt) Ltd & Anor</i> 2000 (1) ZLR 425 (H)	353
<i>Chanakira v Mapfumo & Anor</i> 2010 (2) ZLR 178 (H)	385
<i>Chataira v ZESA</i> 2001 (1) ZLR 30 (H)	169
<i>Chatizembwa v Circle Cement</i> HH 121/1994	190
<i>Chawatama v United Touring Co</i> 2004 (2) ZLR 268 (S)	421
<i>Chegututu Municipality v Manyora</i> 1996 (1) ZLR 262 (S)	240
<i>Cherera v Chitungwiza Municipality</i> 2000 (2) ZLR 273 (H)	125
<i>Chidziva & Others v ZISCO Ltd</i> 1997 (2) ZLR 368 (S)	197, 205, 207, 209
<i>Chikomba Rural District Council v Pasipanodya</i> 2012 (1) ZLR 577 (S)	118, 149
<i>Chikonye & Anor v Peterhouse</i> 1999 (2) ZLR 329 (S)	40, 403
<i>Chinowaita & Anor v Air Zimbabwe (Pvt) Ltd</i> 2003	

(1) ZLR 402 (H) 152,	164
<i>Chinyerere & Others v The Cotton Company of Zimbabwe</i>	
SC 113/1999	225
<i>Chiokoyo v Ndlovu & Ors</i> HH 321/2014	407
<i>Chipunza & Ors v Beverley Building Society</i> 2002	
(2) ZLR 231 (H)	207
<i>Chirasasa & Ors v Nhamo</i> NO & Anor 2003	
(2) ZLR 206 (S)	104, 106, 109
<i>Chiremba & Others v Reserve Bank of Zimbabwe</i> 2000	
(2) ZLR 370 (S)	67, 335
<i>Chirenga v Delta Distribution</i> 2003 (1) ZLR 517 (H)	167, 193
<i>Chiriseri & Anor v Plan International</i> 2002 (2)	
ZLR 261 (S)	257, 260, 263, 267
<i>Chironda v Swift Transport</i> 1996 (1) ZLR 142 (S)	138
<i>Chisipite School Trust (Pvt) Ltd v Clarke</i> 1999 (2)	
ZLR 324 (S)	122
<i>Chitanga v Chairman, Public Service Commission</i>	
& Anor 2000 (1) ZLR 201 (H)	486
<i>Chivinge v Mushayakarara & Anor</i> 1998 (2)	
ZLR 500 (S)	108, 109
<i>Choga v Johnston's Motor Transport (Pvt) Ltd</i> 1998	
(2) ZLR 560 (H)	114
<i>Chubb Union Zimbabwe (Pvt) Ltd v Chubb</i>	
Union Workers' Committee SC 1/2001	150
<i>Church of the Province of Central Africa v Kunonga &</i>	
Anor 2008 (1) ZLR 413 (S)	423
<i>Circle Cement (Pvt) Ltd v Nyawasha</i> 2004 (1)	
ZLR 243 (S)	180
<i>Circle Trucking v Mika Mahachi</i> SC 4/2007	154
<i>City of Gweru v Josphat Munyari</i> SC 15/2005	353
<i>City of Harare v Harare Municipal Workers' Union</i>	
2006 (1) ZLR 491 (H)	385, 388
<i>City of Harare v Zimucha</i> 1995 (1) ZLR 285 (S)	68
<i>City of Mutare v Agatha Samupindi</i> SC 20/2006	126, 423
<i>City of Mutare v Fanuel Mudzime & Others</i> SC 91/1999	07

<i>City of Mutare v Matamisa</i> 1998 (1) ZLR 512 (S)	07
<i>City of Mutare v Mlambo</i> 1992 (1) ZLR 17 (S)	167
<i>City of Mutare v Ncube and Another</i> HH 139/1987	410, 413
<i>City of Mutare v Samupindi</i> 2006 (2) ZLR 176 (S)	423
<i>Coh Coh Enterprises (Pvt) Ltd v Mativenga & Anor</i> 2001 (1) ZLR 151 (S)	152, 171
<i>Colcom Foods Limited v Christopher Kabasa</i> SC 12/2004	109
<i>Colcom Foods Ltd v Felix Chatira</i> SC 135/2000	149
<i>Cold Storage Company National Workers' Committee v Cold Storage Co. Ltd</i> 2002 (1) ZLR 141 (H)	297, 309
<i>Cole Chandler Agencies (Pvt) Ltd v Twenty-five Named Employees</i> SC 161/1998	452
<i>Commercial and Industrial Holdings (Pvt) Ltd v Leigh-Smith</i> 1982 (1) ZLR 247 (S); 1982 (4) SA 226 (ZS)	60
<i>Commercial Careers College (1980) (Pvt) Ltd v Jarvis</i> 1989 (1) ZLR 344 (S)	108, 232/3, 235, 243, 244, 245
<i>Commissioner of Police v Wilson</i> 1981 ZLR	451 477
<i>Communication & Allied Service Workers' Union Zimbabwe v Zimpost & Minister of Public Service</i> LC/H/180/2004	517
<i>Communications & Allied Industries Pensioners Association v Communications & Allied Industries Pension Fund</i> SC 29/2008	501
<i>Communications and Allied Services Workers' Union of Zimbabwe v Tel-One (Pvt) Ltd</i> 2005 (2) ZLR 280 (H)	189, 193, 416, 458
<i>Communications and Allied Services Workers' Union of Zimbabwe v Tel-One (Pvt) Ltd</i> HH 91/2005	297
<i>Continental Fashions (Pvt) Ltd v Mupfuriri and Ors</i> 1997 (2) ZLR 405 (S)	197, 214, 224, 320
<i>CT Bolts (Pvt) Ltd v Workers' Committee</i> 2012 (1) ZLR 363 (S)	310

D

<i>Dairiboard Zimbabwe Ltd v Muyambi</i> 2002 (1) ZLR 448 (S)	244
<i>Dalny Mine v Banda</i> 1999 (1) ZLR 220 (S)	401

<i>David Moyo v Rural Electrification Agency SC 4/2014</i>	132
<i>Delta Corporation Limited v Paul Gwashu SC 96/2000</i>	153, 159
<i>Delta Operations (Pvt) Ltd v Origen Corporation (Pvt) Ltd 2007 (2) ZLR 81 (S)</i>	385
<i>Design Incorporated (Pvt) Ltd v Innocent Chapangura and Eighty-eight others SC 23/2003</i>	166
<i>Dhege v Bell Medical Centre 2004 (1) ZLR 352 (H)</i>	50
<i>DHL International (Pvt) Ltd v Madzikanda 2010 (1) ZLR 201 (H)</i>	122, 396
<i>Dhlodhlo v Deputy Sheriff, Marondera & Ors 2011 (1) ZLR 416 (H)</i>	376, 378
<i>Director of Works & Anor v Nyasulu & Ors 2002 (1) ZLR 658 (S)</i>	63, 125
<i>Dudka & Ors v Cheni Investments (Pvt) Ltd & Ors 2011 (1) ZLR 1 (H)</i>	376
<i>Duly Holdings Ltd v Spanera 2005 (1) ZLR 407 (S)</i>	259
<i>Duly Holdings v Chanaiwa 2007 (2) ZLR 1 (S)</i>	158

E

<i>Eagle Tanning (Pvt) Ltd & Anor v Employees of Eagle Tanning (Pvt) Ltd SC 238/2001</i>	351
<i>EBI Zimbabwe (Pvt) Ltd v Old Mutual Unit Trusts (Pvt) Ltd & Anor 2009 (1) ZLR 356 (H)</i>	365
<i>Edgars Stores Managers Association v Edgars Stores Limited SC 103/2004</i>	379
<i>Elvis Ndlovu v Higher Learning Centre HB 86/2010</i>	371

F

<i>F D Arian & Co (Pvt) Ltd v Tsodzo & Anor 1993 (1) ZLR 50 (SC)</i>	418
<i>Farm Community Trust v Claudious Chemhere SC 22/2013</i>	421
<i>Fawcett Security Operations (Pvt) Ltd v Omar Enterprises (Pvt) Ltd 1991 (2) ZLR 291 (S)</i>	83, 84, 85, 86
<i>Fawcett Security Operations (Pvt) Ltd v Amos Phiri SC 53/2000</i>	172
<i>Ferguson & Partners v Zimbabwe Federation of Trade Unions & Ors 2004 (1) ZLR 475 (H)</i>	337

<i>Finlayson v Standard Chartered Pension Fund Trustees</i>	
1995 (1) ZLR 302 (H)	501
<i>First Banking Corporation Limited v Balthazar</i>	
Zindoga Marimo SC 57/2005	424
<i>First Mutual Life Assurance Ltd v Muzivi</i>	
2007 (1) ZLR 325 (S) 257, 307, 398,	441
<i>Fisher and Ors v Air Zimbabwe Corporation</i> HH 306/1988	418
<i>Flexible Packaging v Zacharias Chinyani Mushonga</i>	
SC 72/2000	198, 206
<i>Fokoseni v Lobels Bakery</i> 2004 (1) ZLR 406 (S)	260
<i>Fonda v Mutare Club</i> HH 40/1991	95
<i>Foreman & Anor v KLM Royal Dutch Airlines</i>	
2001 (1) ZLR 108 (H)	66
<i>Forestry Commission v Moyo</i> 1997 (1) ZLR 254 (S)	132
<i>Founders Building Society v Mazuka</i> 2000 (1) ZLR 528 (H)	190
<i>Freda Rebecca Gold Mine Holdings Limited v M Nhliziyo</i>	
and 180 Others SC 16/2013 ..	227, 228
<i>FSI Holdings Ltd v Rio Tinto Zimbabwe Ltd & Anor</i>	
1997 (1) ZLR 31 (S)	384
<i>Fungura & Anor v Zimnat Insurance Co Ltd</i> 2001 (1) ZLR 412 (S)	211

G

<i>Gauntlet Security Services (Pvt) Ltd v George Mubaiwa</i>	
SC 26/2003	123
<i>Gauntlet Security Services (Pvt) Ltd v Las Hlabangani</i>	
SC 51/2004	115
<i>Gauntlet Security Services (Pvt) Ltd v Leonard</i>	
1997 (1) ZLR 583 (S)	242, 247, 251, 256
<i>Gaylord Baudi v Kenmark Builders (Pvt) Ltd</i>	
HH 4/2012	370, 373, 378
<i>Gershum Hombarume v Zimbabwe Revenue Authority</i>	
SC 24/2010	169
<i>Getrude Kwaramba v Bain Industries (Pvt) Ltd</i> HH 150/2000;	
SC 39/2001	109
<i>Gift Musiyarira v Rufaro Marketing (Pvt) Ltd</i> SC 96/2005	406

<i>Girjac Services (Pvt) Ltd v Mudzingwa</i> 1999 (1) ZLR 243 (S)	88, 243, 414, 417
<i>Giya v Ribi Tiger Trading</i> HH 57/2014	374
<i>Gomwe & Anor v Associated Newspapers of Zimbabwe (Pvt) Ltd</i> 2001 (2) ZLR 415 (H)	47
<i>Greendale Hardware & Electrical (Pvt) Ltd v Bangaba</i> 2007 (2) ZLR 17 (S)	60
<i>Gumbo v Norton-Selous Rural Council</i> 1992 (2) ZLR 403 (S)	06
<i>Guruva v Traffic Safety Council of Zimbabwe</i> 2009 (1) ZLR 58 (S)	62
<i>Gwalazimba v PG Merchandising Ltd & Anor</i> 1993 (2) ZLR 215 (S)	222, 395
<i>Gwaze v National Railways of Zimbabwe</i> 2002 (1) ZLR 679 (S)	418
<i>Gweru Water Workers' Committee v City of Gweru</i> SC 59/2013	311

H

<i>Hama v NRZ</i> 1996 (1) ZLR 664 (S)	09, 87, 237, 420
<i>Hamilton Fortunate Gomba v Associated Mine Workers' Union</i> HH 118/2005	397
<i>Hammer and Tongues (Pvt) Ltd v Obadiah Giya</i> SC 54/2004	97
<i>Harry Mandongwe v Art Corporation Ltd</i> SC 15/2004	140
<i>Heywood Investments (Pvt) Ltd t/a GDC Hauliers v Pharaoh Zakeyo</i> SC 32/2013	258, 400
<i>Holland & Ors v Minister of the Public Service, Labour and Social Welfare</i> 1997 (1) ZLR 186 (S)	277
<i>Husaihwevhu & Ors v UZ-USF Collaborative Research Programme</i> 2010 (1) ZLR 448 (H)	373, 378

I

<i>Industrial Steel & Pipe Ltd v Moodie</i> 1997 (1) ZLR 617 (S)	116
<i>Innscor Africa (Pvt) Ltd v Lethon Chimoto</i> SC 6/2012	127

J

<i>Jakazi & Anor v Church of Province of Central Africa & Ors</i> 2010 (1) ZLR 335 (H)	93
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- Jiah & Ors v PSC & Anor* 1999 (1) ZLR 17 (S) . 486
JIT Industries (Pvt) Ltd v Ian Moses Sibanda SC 101/2000 162
Julius Chikomwe and 241 others v Standard Chartered Bank of Zimbabwe Limited and A.G. Nyazika HH 203/1997 187

K

- Kadir and Sons (Pvt) Ltd v Panganai and Anor* 1996 (1)
ZLR 598 (S) 205, 218, 219
*Kadoma Magnesite (Pvt) Ltd v Acting Regional
Hearing Officer & Ors* 1991 (1) ZLR 283 (HC) 134, 236, 411, 413, 461
Kadada v City of Harare HH 26/1994 93
Kandoma v Shades of Black Cosmetics (Pvt) Ltd SC 115/2004 91
Karembera v Mvurwi Rural District Council 1999
(1) ZLR 327 (SC) 120, 121
Katiyo v Standard Chartered Zimbabwe Pension Fund
1994 (1) ZLR 225 (H) 500
Kazembe v Adult Literacy Organisation SC 173/1994 45, 96
*Kingdom Bank Workers' Committee v Kingdom Bank
Financial Holdings* 2012 (1) ZLR 93 (H) 370, 373, 377, 378, 423
*Kundai Magodora & Ors v Care International
Zimbabwe* SC 24/2014 40, 102, 422, 516
Kwangwari v CBZ 2003 (1) ZLR 551 (H) 97

L

- Lawsign Nyarumbu v Sandvik Mining and Construction
Zimbabwe (Pvt) Ltd* SC 31/2013 179, 181, 401
Lee Group of Companies v Ann Claire Elder SC 6/2005 93
*Leopard Rock Hotel Co (Pvt) Ltd & Anor v
Walenn Construction (Pvt) Ltd* 1994 (1) ZLR 255 (S) 365, 384
Leopard Rock Hotel Co (Pvt) Ltd v Van Beek 2000
(1) ZLR 251 (S) 251, 253, 265, 271
Lever Brothers (Pvt) Ltd v Elisha Pfumo SC 37/2003 155
Lever Brothers (Pvt) Ltd v Sheila Marafuzah & Ors SC 23/1997 41
Lever Brothers v Bimha & Others 2004 (2) ZLR 188 (S) 344
Liquidator, ZECO Ltd v Registrar, Pensions and Provident

Funds & Ors 2002 (2) ZLR 22 (S) 500

M

- Mabhena v PG Industries 2002 (2) ZLR 63 (H)* 177
- Machiya v BP Shell Marketing Service (Pvt) Ltd 1997*
 (2) ZLR 473 (S) 166
- Machongwe v Redcliff Municipality 1998 (2) ZLR 145 (S)* 142
- Mackenzie v Rio Tinto Zimbabwe 2005 (1) ZLR 462 (S)* 160, 161
- Madawo v Interfresh Ltd 2000 (1) ZLR 660 (H)* 45, 96
- Madoda v Tanganda Tea Co. 1999 (1)*
 ZLR 374 (SC) 153, 156, 173, 175, 342
- Madyara v Globe & Phoenix Industries (Pvt)*
 Ltd 2002 (2) ZLR 169 (S) 246, 260, 264, 267, 270
- Maguchu v Lever Bros (Pvt) Ltd 2000 (2) ZLR*
 187 (S) 245
- Makova v Urban Development Corp 1992 (1) ZLR 326 (H)* 121
- Makuwaza v NRZ 1997 (2) ZLR 453 (S)* 142, 148
- Makwiramiti v Fidelity Life Assurance of Zimbabwe*
 & Anor 1998 (2) ZLR 471 (S) 500
- Makwiro Platinum Mines v Paradzayi 2004 (2) ZLR 184 (S)* 163
- Malimanji v CABS 2007 (2) ZLR 77 (S)* 155
- Mandiringa & Ors v National Social Security Authority*
 2005 (2) ZLR 329 (H) 368
- Mangwana v Mparadzi 1989 (1) ZLR 79 (SC)* 60
- Maranatha Ferrochrome v Oswell Nyemba SC 28/2012* 56, 67
- Marcussen & Cocksedge v Dzikiti 2007 (1) ZLR 146 (S)* 399
- Marondera Rural District Council v Morris & Ors*
 2006 (1) ZLR 63 (S) 464
- Martin Malunga & Ors v Post and Telecommunications*
 Corporation SC 117/1999 67
- Martin Sibanda and Godfrey Moyo v Benson Chinemhute*
 N.*O and Martindale Trading (Pvt) Ltd t/a Lyons HH 131/2004396
- Martin v Attorney-General & Anor 1993 (1) ZLR 153 (S)* 404
- Marvo Stationary Manufacturing (Pvt) Ltd v Jokwani*
 & Ors 2005 (2) ZLR 261 (S) 160, 183

<i>Masasi v Posts and Telecommunications Corporation</i>	
1991 (2) ZLR 73 (HC)	06
<i>Maseko v Jongwe Printing & Publishing Co (Pvt) Ltd</i>	
2002 (2) ZLR 571 (H)	257
<i>Mashave & Ors v ZUPCO & Anor</i> 2000 (1) ZLR 478 (S)	226
<i>Mashave v Zupco SC</i> 24/2000	216
<i>Mashonaland Turf Club v Mutangadura</i> 2012 (1)	
ZLR 183 (S)	122, 126
<i>Mashonganyika v Lena NO & Anor</i> 2001 (2)	
ZLR 103 (H)	150, 193, 358
<i>Masiyiwa v TM Supermarket</i> 1990 (1) ZLR 166 (SC)	236
<i>Masundire v Mazda Motor Industries HH</i> 5958/1995	108
<i>Matamisa v Chiyangwa & Anor (Chinhoyi Election</i>	
<i>Petition)</i> 2001 (1) ZLR 334 (H)	179
<i>Matamisa v City of Mutare</i> 1997 (2) ZLR 122 (H)	07
<i>Matereke v CT Bowring & Associates (Pvt) Ltd</i>	
1987 (1) ZLR 206 (S)	136
<i>Matungamire v Posts & Telecommunications</i>	
<i>Corporation</i> 2002 (2) ZLR 462 (S)	149
<i>Mawere & Anor v Central Intelligence</i>	
<i>Organization</i> 2007 (2) ZLR 246 (S)	480
<i>Mawuta v Secretary for Finance</i> 2003 (2) ZLR 323 (H)	169
<i>Mbisva v Rainbow Tourism Group Ltd</i> 2009 (2) ZLR	
33 (S)	421
<i>McCosh v Pioneer Corporation Africa Ltd</i> 2010 (2)	
ZLR 211 (H)	66
<i>Medical Investments Ltd t/a Avenues Clinic v Florence</i>	
<i>Chingwena SC</i> 2/2012	156, 175
<i>Medical Investments Ltd v Pedzisayi</i> 2010 (1)	
ZLR 111 (H)	122, 396, 418
<i>Merchant Bank of Central Africa v Dube</i> 2004 (1)	
ZLR 155 (S)	144, 176, 402
<i>Merlin Ex-Workers' v Merlin Limited SC</i> 4/2001	204
<i>Metsola v Chairman, Public Service Commission &</i>	
<i>Anor</i> 1989 (3) ZLR 147 (SC)	486

<i>Mhowa v Beverley Building Society</i> 1998 (1) ZLR 546 (S)	142, 190, 303
<i>Midlands State University Council v Midlands State University Lecturers' Association</i> 2005 (2) ZLR 213 (S)	48, 388, 421, 481
<i>Minister of Information v PTC Managerial Employees Workers' Committee</i> 1999 (1) ZLR 128 (S)	66
<i>Minister of Labour and Ors v PEN Transport (Pvt) Ltd</i> 1989 (1) ZLR 293 (SC)	411
<i>MMCZ v Mazvimavi</i> 1995 (2) ZLR 353 (S)	161, 167, 173, 175, 184, 192
<i>Mnensa v Anor v Chingwena NO & Anor</i> 2002 (2) ZLR 475 (H)	161
<i>Moyo & Ors v Central African Batteries (Pvt) Ltd</i> 2002 (1) ZLR 615 (S)	450, 452
<i>Moyo v Forestry Commission</i> 1996 (1) ZLR 173 (H)	417
<i>Moyo v Gwindingwi NO & Anor</i> 2011 (2) ZLR 368 (H)	122, 396, 417
<i>Mpofu v Commissioner of Police & Anor</i> 2010 (2) ZLR 389 (H)	258
<i>Mpumela v Berger Paints (Pvt) Ltd</i> 1999 (2) ZLR 146 (S)	140, 420
<i>Mtetwa & Anor v Mupamhadzi</i> 2007 (1) ZLR 253 (S)	380
<i>Muchaka v Zhanje & Anor</i> 2009 (2) ZLR 9 (H)	385
<i>Muchakata v Netherburn Mine</i> 1996 (1) ZLR 153 (S)	138, 399
<i>Muchenje v Bata Shoe Company</i> 2003 (2) ZLR 462 (S)	136
<i>Mudakureva v Grain Marketing Board</i> 1998 (1) ZLR 145 (S)	90
<i>Mudarikwa & Anor v Director of Housing & Community Services & Anor</i> 2007 (1) ZLR 41 (S)	77
<i>Mudzi Rural District Council v Makwembere</i> 2005 (2) ZLR 318 (S)	355
<i>Mugabe & Anor v Law Society of Zimbabwe</i> 1994 (2) ZLR 356 (S)	178
<i>Mugabe & Ors v Zvimba RDC</i> 2006 (2) ZLR 84 (S)	215
<i>Mugwebi v Seed Co Ltd & Anor</i> 2000 (1) ZLR 93 (S)	177
<i>Mukundi Plastics (Pvt) Ltd v Elijah Chasekwa & 13 Ors</i> SC 23/2011	400
<i>Mukundu v Chairman, Mutasa RDC</i> 2002 (1) ZLR 469 (S)	07
<i>Mukwenge v Clan Transport Co (Pvt) Ltd</i> 2001 (1) ZLR 199 (S)	255

<i>Munhumutema v Tapambwa & Ors</i> 2010 (1) ZLR 509 (H)	243
<i>Munyuki v City of Gweru</i> 1998 (1) ZLR 182 (S)	130
<i>Murawo v GMB</i> 2009 (1) ZLR 304 (S)	154
<i>Muringi v Air Zimbabwe Corporation & Anor</i> 1 997 (2) ZLR 488 (S)	185, 245
<i>Musandu v Chairperson, Crests Disciplinary and Grievance Committee</i> HH 115/1994	412, 413
<i>Musarira v Anglo-American Corporation</i> 2005 (2) ZLR 267 (S)	167, 170
<i>Musendekwa v Posts and Telecommunications HH 33/1991</i>	06
<i>Mushoriwa v Zimbank</i> 2008 (1) ZLR 125 (H)	395
<i>Musonza (Pvt) Ltd v Standard Fire & General Insurance Co (Pvt) Ltd & Anor</i> 2002 (1) ZLR 535 (H)	366
<i>Mutare Board and Paper Mills (Pvt) Ltd v Kodzanai</i> 2000 (1) ZLR 641 (S)	200
<i>Mutare Rural District Council v Chikwena</i> 2000 (1) ZLR 534 (S)	49
<i>Mutsuta & Anor v Cagar (Pvt) Ltd</i> 2009 (2) ZLR 327 (S)	421, 422
<i>Mutukwa v National Dairy Co-operative Ltd</i> 1996 (1) ZLR 341 (S)	105
<i>Muwenga v PTC</i> 1997 (2) ZLR 483 (S)	77
<i>Muzenda v PSC</i> 2002 (2) ZLR 551 (H)	486
<i>Muzengi v Standard Chartered Bank & Anor</i> 2002 (1) ZLR 334 (S)	93, 414, 417
<i>Muzondo v University of Zimbabwe</i> 1981 ZLR 333; 1981 (4) SA 755	54, 63, 245
<i>Muzuva v United Bottlers (Pvt) Ltd</i> 1994 (1) ZLR 217 (S)	419
<i>Mvere v Tanganda Tea Co Ltd</i> 2004 (2) ZLR 271 (S)	182
<i>Mvududu v Agricultural and Rural Development Authority</i> 2011 (2) ZLR 440 (H)	371, 378
<i>Mwenye v Lonhro Zimbabwe Ltd</i> 1999 (2) ZLR 429 (S)	150
<i>Muronzerei v Petrol Trade (Pvt) Ltd</i> HH 95/2014	372

N

- National Employment Council for the Catering Industry v Catering and Hospitality Industry Workers' Union of Zimbabwe* 2008 (1) ZLR 311 (S) ... 317
- National Foods Limited v Magadza* SC 105/1995 .. 420
- National Foods Ltd v Kare* 1990 (1) ZLR 223 (HC) 411
- National Foods Ltd v Masukusa* 1994 (1) ZLR 66 (S) 92, 137
- National Railways of Zimbabwe v Gibson Siziba* SC 12/2001 . 338
- National Union of Railwaymen v Zimbabwe Amalgamated Railways* SC 8/1996 295
- Ncube v Wankie Colliery Co & Anor* 2007 (1) ZLR 96 (H) 490
- Ndebele v International Crops Research Institute for Semi-Arid Tropics* 2002 (1) ZLR 666 (H) .. 111
- Ndlovu v Highlanders Football Club* 2011 (1) ZLR 631 (H) ... 352
- NEI Zimbabwe v Lynette Makuzva* SC 24/2006 .. 126, 201
- Net One Cellular (Pvt) Ltd v Net One Employees & Anor* 2005 (1) ZLR 275 (S) 423
- NetOne Cellular (Pvt) Ltd v Communication and Allied Services Workers' Union of Zimbabwe and Fifty-six NetOne Employees* SC 89/2005 ... 117, 188, 366, 367, 442, 450, 451, 452, 466
- NetOne Cellular (Pvt) Ltd v NetOne Employees & Anor* 2005 (1) ZLR 275 (S) 378
- Ngulube v ZESA & Anor* 2002 (2) ZLR 335 (S) 287, 307
- Nicholas v Fraser Alexander Zimbabwe (Pvt) Ltd* 2001 (2) ZLR 272 (H) .. 121
- Nixon Ramani v National Social Security Authority* SC 38/2003 ... 151
- Nkomo & Ors v Rubber & Allied Products (Pvt) Ltd & Anor* 2002 (2) ZLR 428 (S) 207
- Nott v ZANU PF* 1984 (2) ZLR 208; 1984 (2) SA 115 (ZS) . 80, 81
- NRZ v Zimbabwe Railway Artisans' Union* 2005 (1) ZLR 341 (S) 395, 396, 457
- NSSA v Chairman, NSSA Workers' Committee & Ors* 2002 (1) ZLR 306 (H) . 380
- NSSA v Dobropoulos & Sons (Pvt) Ltd* 2002 (2) ZLR 617 (S) 82
- Ntini v Jongwe Printing and Publishing Company* HH 623/1987 418
- Nyaguse v Mkwesine Estates (Pvt) Ltd* 2000 (1)

<i>ZLR 571 (S)</i>	253, 255, 259, 270
<i>Nyahuma v Barclays Bank (Pvt) Ltd 2005 (2)</i>	
<i>ZLR 445 (S)</i>	135, 176, 177, 183
<i>Nyakanyanga v Postmaster-General HH 19/1989</i>	06
<i>Nyambirai v NSSA & Anor 1995 (2) ZLR 1 (S)</i>	496, 518
<i>Nyangoni & Others v Zimbabwe Development Corporation & Others 2001 (1) ZLR 1 (S)</i>	210
<i>Moyo v Secretary for Justice, Legal and Parliamentary Affairs 1988 (2) ZLR 185 (HC)</i>	486
<i>Nyoni v Secretary for Public Service, Labour & Social Welfare & Anor 1997 (2) ZLR 516 (H)</i>	165

O

<i>O'Shea v Chiunda 1999 (1) ZLR 333 (5)</i>	57
<i>Oil Blending Enterprises (Pvt) Ltd v Minister of Labour 2001 (2) ZLR 446 (H)</i>	358
<i>Old Mutual v Old Mutual Workers' Committee SC 257/1996</i>	310, 325, 337, 359
<i>Olivine Industries (Pvt) Ltd v Gwekwerere 2005 (2) ZLR 421 (S)</i>	239
<i>Olivine Industries (Pvt) Ltd v Jack & Ors 2005 (1) ZLR 356 (S)</i>	191
<i>Olivine Industries (Pvt) Ltd v Nharara 2006 (1) ZLR 203 (S)</i>	253, 258
<i>Olivine Industries (Pvt) Ltd v Olivine Workers' Committee 2002 (2) ZLR 200 (S)</i>	310, 330

P

<i>Pamire & Ors v Dumbutshena NO & Anor 2001 (1) ZLR 123 (H)</i>	381
<i>Pangeti v Grain Marketing Board 2002 (1) ZLR 454 (H)</i>	174
<i>PG Industries (Pvt) Ltd v Nkululeko Mabhena 2003 (2) ZLR 206 (S)</i>	109
<i>PG Industries (Zimbabwe) Ltd v Machawira 2012 (1) ZLR 552 (H)</i>	352, 397
<i>Phillips Central Cellars (Pvt) Ltd v Director of Customs and Excise 2000 (1) ZLR 353 (H)</i>	86

<i>Phineas Matoi v Zimbabwe Iron and Steel Co Ltd SC 231/1993</i>	148
<i>Phiri & Others v Industrial Steel & Pipe (Pvt) Ltd 1996 (1) ZLR 45 (S)</i>	190, 222
<i>Plaza Hotel (Pvt) Ltd v Marimbata & Anor 2007 (1) ZLR 80 (H)</i>	396
<i>POSB v Chimanihire & Ors 2005 (1) ZLR 285 (H)</i>	284
<i>Posts & Telecommunications Corporation v Winfreda Ndakaiteyi Mhaka HH 127/2003</i>	32
<i>Posts & Telecommunications Corporation v Zimbabwe Posts & Telecommunications Workers' Union & Ors 2002 (2) ZLR 722 (S)</i>	327, 341, 347, 348
<i>Posts and Telecommunications Corporation v PG Swabata SC 42/2003</i>	255, 259
<i>Posts and Telecommunications Corporation v Zvenyika Chizema SC 108/2004</i>	165
<i>Prize Mahachi v Barclays Bank of Zimbabwe Ltd SC 6/2006</i>	406
<i>Proton Bakery (Pvt) Ltd v Takaendesa 2005 (1) ZLR 60 (S)</i>	402
<i>Provincial Superior, Jesuit Province of Zimbabwe v Kamoto & Ors 2007 (2) ZLR 8 (S)</i>	385
<i>PSC v Tsomondo 1988 (1) ZLR 427 (SC)</i>	486
<i>PTC v Chihoro 1997 (1) ZLR 148 (S)</i>	139
<i>PTC v Mahachi 1997 (2) ZLR 71 (H)</i>	190
<i>Pungwe Breweries (Pvt) Ltd v Solomon Mambondiani & 42 others and Flossie Machakata & 16 others SC 90/2004</i>	462

Q

<i>Quest Motor Corporation (Pvt) Ltd v Nyamakura 2000 (2) ZLR 84 (H)</i>	56, 145
--	---------

R

<i>Rachel Stewart & Ors v The Vice-Chancellor of the University of Zimbabwe & Anor SC 97/2001</i>	78
<i>Redstar Wholesalers v Edmore Mabika SC 52/1995</i>	258, 260, 264, 268
<i>Redstar Wholesalers v Mutamba 2005 (1) ZLR 411 (S)</i>	398
<i>Reserve Bank of Zimbabwe v Shiwawa Estate's</i>	

<i>Executor 1999 (1) ZLR 185 (S)</i>	89, 252, 269
<i>Retrenched Employees of Natbrev v</i>	
<i>Natbrev Ltd & Anor 2003 (1) ZLR 263 (S)</i>	202, 221
<i>Ritchie v Delta Pension Fund 1992 (2) ZLR 413 (S)</i>	498, 499
<i>Riva v National Social Security Authority 2002 (1) ZLR 412 (H)</i>	94
<i>Robson Marimo v National Breweries SC 125/2000</i>	151
<i>Rose NO v Fawcett Security Operations (Pvt) Ltd</i>	
<i>1998 (2) ZLR 114 (H)</i>	86
<i>Rutunga & Ors v Chiredzi Town Council & Anor</i>	
<i>2003 (1) ZLR 197 (S)</i>	439
<i>Ruturi v Heritage Clothing (Pvt) Ltd</i>	
<i>1994 (2) ZLR 374 (S)</i>	114, 256, 421

S

<i>S v A Juvenile 1989 (2) ZLR 61 (SC)</i>	518
<i>S.T. Chikanda v United Touring Company Limited SC 7/1999</i>	401
<i>Sable Chemical Industries Ltd v Easterbrook</i>	
<i>2010 (2) ZLR 342 (S)</i>	165, 174, 176
<i>Samanyau & Ors v Pleximail (Pvt) Ltd</i>	
<i>2011 (1) ZLR 527 (H)</i>	258, 395
<i>Samkange v Wycombe Foundation 2001 (1) ZLR 8 (S)</i>	124, 137
<i>Samudzimu v Dairiboard Holdings Ltd</i>	
<i>2010 (1) ZLR 357 (H)</i>	365, 372, 374, 378, 397
<i>Samuriwo v ZUPCO 1999 (1) ZLR 385 (H)</i>	109, 157
<i>Santo v General Accident Insurance Co</i>	
<i>(Zimbabwe) Ltd 1995 (1) ZLR 322 (S)</i>	492
<i>Savanhu v Postmaster General 1992 (2) ZLR 455 (H)</i>	193
<i>Securities (Pvt) Limited v Husa Musora SC 15/2000</i>	177
<i>Senele Dhlomo-Bhala v Lowveld Rhino</i>	
<i>Trust HH 263/2013</i>	369, 370, 372, 374, 378
<i>Shadreck Moyo & Ors v JL Hoffman & Anor SC 26/2013</i>	111
<i>Sheckem Barrister Ngazimbi v Murowa Diamonds (Pvt) Ltd SC</i>	
<i>27/2013</i>	419, 423
<i>Sibanda v Independence Gold Mining Zimbabwe</i>	
<i>(Pvt) Ltd & Anor 2003 (2) ZLR 155 (H)</i>	490

<i>Sibanda v Postmaster General</i> HH 263/1990	193
<i>SIRDC v Chakuparira</i> 2001 (2) ZLR 421 (S)	45, 96
<i>Small Enterprises Development Corporation</i> v <i>David Chemhere</i> SC 23/2002	162, 403, 406
<i>Southampton Assurance Co of Zimbabwe Ltd v Mutuma & Anor</i> 1990 (1) ZLR 12	28
<i>Southdown Holdings Ltd v Mariwa</i> 2003 (2) ZLR 318 (H)	191
<i>Speciss College v Maxwell Chiriseri, Emmanuel Chidodo and Allan Musevenzi</i> SC 2/2013	467
<i>Stanbic Bank Zimbabwe Ltd v Charamba</i> 2006 (1) ZLR 96 (S)	206, 208, 217
<i>Standard Chartered Bank of Zimbabwe Limited v</i> <i>Julius Chikomwe and 211 others</i> SC 77/2000	162, 174
<i>Standard Chartered Bank v Chinyemba</i> 2004 (2) ZLR 197 (S)	401
<i>Standard Chartered Bank Zimbabwe Ltd v Chipiningu</i> 2004 (2) ZLR 94 (S)	135, 183
<i>Standard Chartered Bank Zimbabwe Ltd v George</i> <i>Musanhu</i> SC 122/2004	136
<i>Standard Chartered Bank Zimbabwe Ltd v Matsika</i> 1996 (1) ZLR 123 (S)	119, 120, 209, 241, 246
<i>Standard Chartered Bank Zimbabwe Ltd v</i> <i>Richardson</i> 2000 (1) ZLR 153 (S)	172
<i>Standard Chartered Finance Zimbabwe Ltd v Georgias & Anor</i> 1998 (2) ZLR 547 (H)	365
<i>Starafrika Corp Ltd v Sivnet Investments (Pvt) Ltd</i> HC 7123/2010	380
<i>Stella Nhari v Zimbabwe Allied Banking Group</i> SC 51/2013	121
<i>Sterling Products International Limited v Zulu</i> 1988 (2) ZLR 293 (SC)	123
<i>Suns Manufacturers v Retrenched Employees</i> SC 120/1999	216

T

<i>Tafuma v Tudor House Consultants (Pvt) Ltd</i> 2002 (2) ZLR 1 (H)93,	93, 122
<i>Tanganda Tea Company Limited v Andrew</i>	

<i>Mvududu SC 1/2007</i>	164
<i>Tavengwa v Marine Centre (Pvt) Ltd 1984 (2) ZLR 173 (H)</i>	19
<i>Taylor v Minister of Higher Education & Anor 1996 (2) ZLR 774 (S)</i>	63
<i>Telecel Zimbabwe Private Limited v Sibangani Mabore SC 50/2013</i>	255
<i>Tel-One (Pvt) Ltd v Communications and Allied Services Workers' Union SC 26/2006</i>	298, 299
<i>Tel-One (Pvt) Ltd v Communication & Allied Services Workers' Union of Zimbabwe 2007 (2) ZLR 262 (H)</i>	386
<i>Tel-One (Pvt) Ltd v Communications and Allied Services Workers' Union of Zimbabwe 2006 (2) ZLR 136 (S)</i>	458, 465, 466
<i>Tel-One (Pvt) Ltd v Zulu 2005 (1) ZLR 133 (S)</i>	260, 262
<i>Tendayi Tamanikwa & Ors v Zimbabwe Manpower Development Fund SC 33/2013</i>	118
<i>The International Committee of the Red Cross v Phyllis Sibanda & Munyama Nyangura SC 48/2003</i>	07
<i>The Late K.C Matema & others v Zimoco SC 118/1999</i>	209
<i>The Soft Drinks Manufacturing Workers' Union v Soft Drinks Employers Association LRT/H/121/2001</i>	346
<i>The Zimbabwe Bata Shoe Company v Zimbabwe Bata Workers' Committee SC 40/2012</i>	310
<i>Thomas Meikle Centre (Pvt) Ltd v TM National Workers' Committee 2002 (2) ZLR 502 (S)</i>	310, 328, 331
<i>Thomas Meikles Stores v Mwaita & Anor 2007 (2) ZLR 185 (S)</i>	92
<i>TM Supermarket v Mangwiro 2004 (1) ZLR 180 (S)</i>	421
<i>TM Supermarket v TM National Workers' Committee SC 19/2004</i>	320
<i>TM Supermarkets v Weston Muchetu SC 123/2004</i>	145
<i>Tobacco Sales Floors Ltd v Chimwala 1987 (2) ZLR 210 (S)</i>	134
<i>Tonderayi Tsingano and forty-five others v Munchville Investments SC 163/1998</i>	455
<i>Total Marketing Zimbabwe (Pvt) Ltd v Pollylamp Investments (Pvt) Ltd 2007 (2) ZLR 60 (S)</i>	422

<i>Total Zimbabwe (Pvt) Ltd v Moyana</i> 2005 (1) ZLR 65 (S)	145
<i>Toyota Zimbabwe v Posi</i> 2008 (1) ZLR 173 (S)	171
<i>Treggers Plastics (Pvt) Ltd v Woodreck Sibanda & Anor</i> SC 22/2012	128
<i>Trust Corp Securities (Pvt) Ltd v Gabilo & Anor</i> 2009 (1) ZLR 343 (H)	366
<i>Trust Me Security Organisation v Mararike & Ors</i> HH 325/2014	373
<i>Tsodzo & Ors v Saybrook (1978) (Pvt) Ltd & Ors</i> SC 13/1999	455
<i>Tuso v City of Harare</i> 2004 (1) ZLR 1 (H)	396
<i>Tutani v Minister of Labour & Ors</i> 1987 (2) ZLR 88 (H)	193, 410, 413, 417

U

<i>United Air Charters (Pvt) Ltd</i> 1994 (2) ZLR 341 (S)	55
<i>United Bottlers (Pvt) Ltd v Murwisi</i> 1995 (1) ZLR 246 (S)	236
<i>United Bottlers v Kaduya</i> 2006 (2) ZLR 150 (S)	09, 259
<i>United Food and Allied Workers' Union of Zimbabwe v Crest Breeders International</i> HH 139/1995	316, 341, 342
<i>University of Zimbabwe v Gudza</i> 1996 (1) ZLR 249 (S)	67, 327
<i>University of Zimbabwe v Kwanele Muriel Jirira and two others</i> SC 6/2013	376
<i>University of Zimbabwe v University of Zimbabwe Staff Association</i> SC 8/2004	337, 402
<i>UTC (Zimbabwe) (Pvt) Ltd v Nelille Chigwedere</i> SC 21/2001	190
<i>UZ-UCSF Collaborative Research Programme in Women's Health v Shamuyarira</i> 2010 (1) ZLR 127 (S)	101, 102, 103, 395

V

<i>Vengesayi & Ors v Zimbabwe Glass Industries Ltd</i> 1998 (2) ZLR 593 (H)	190
<i>Vice Chancellor, University of Zimbabwe and Anor v Mutasah and Anor</i> 1993 (1) ZLR 162 (S)	167
<i>Vimbainashe Theophelus Dube v Standard Chartered Bank</i> SC 105/2004	123

W

<i>Wattle Company Pine Division v Mark Marwisa and 66 others</i> SC 43/2004	400
<i>Watyoka v ZUPCO (Northern Division)</i> 2006 (2) ZLR 170 (S)	151
<i>Wentworth-Wear v Zvipundu</i> 2000 (1) ZLR 281 (S)	82
<i>Wholesale Centre (Pvt) Ltd v Mehlo & Ors</i> 1992 (1) ZLR 376 (H)	461
<i>Winterton, Holmes & Hill v Paterson</i> 1995 (2) ZLR 68 (S)	135, 237, 243
<i>Workers' Compensation Commissioner v FA Stewart (Pvt) Ltd</i> 1990 (2) ZLR 376 (SC)	493

Z

<i>ZB Financial Holdings v Maureen Manyarara</i> SC 3/2012	126, 127
<i>ZCTU v Makonese</i> 2005 (1) ZLR 430 (S)	138
<i>ZESA v Bopoto</i> 1997 (1) ZLR 126 (S)	120
<i>ZESA v Dera</i> 1998 (1) ZLR 500 (S)	142, 178, 179
<i>ZESA v Maposa</i> 1999 (2) ZLR 452 (S)	151, 385
<i>ZESA v Mare</i> 2005 (2) ZLR 222 (S)	311
<i>ZESA v ZESA Employees</i> 2005 (1) ZLR 127 (S)	456
<i>ZFC Ltd v Geza</i> 1998 (1) ZLR 137 (S)	185, 406
<i>Zikiti v United Bottlers</i> 1998 (1) ZLR 389 (H)	171, 193, 415
<i>ZIMASCO (Pvt) Ltd v Chizema</i> 2007 (2) ZLR 314 (S)	181
<i>ZIMASCO (Pvt) Ltd v Marikano</i> 2010 (2) ZLR 167 (H)	122, 396
<i>Zimasco (Pvt) Ltd v Maynard Farai Marikano</i> SC 6/2014	105, 399, 402
<i>Zimbabwe Alloys Ltd v Machohonyi</i> 2006 (1) ZLR 390 (S)	140
<i>Zimbabwe Banking & Allied Workers' Union & Anor v Beverley Building Society & Ors</i> 2010 (1) ZLR 292 (S)	278, 285
<i>Zimbabwe Broadcasting Holdings v Gono</i> 2010 (1) ZLR 8 (H)	122
<i>Zimbabwe Educational, Scientific, Social and Cultural Workers' Union v Welfare Educational Institutions Employers Association</i> SC 11/2013	382, 396
<i>Zimbabwe Financial Holdings v Mafunga</i> 2005 (2) ZLR 289 (S)	169, 178, 179
<i>Zimbabwe Graphical Workers' Union v Federation</i>	

<i>of Master Printers of Zimbabwe & Anor</i>	
(2) ZLR 103 (S)	444, 449, 450, 451, 455
<i>Zimbabwe Iron & Steel Co. Ltd v Dube & Ors</i>	
1997 (2) ZLR 172 (S)	465
<i>Zimbabwe Mining & Smelting Co v Zakeyo</i>	
2007 (1) ZLR 132 (S)	57, 142, 179, 182
<i>Zimbabwe Mining and Smelting v Mafuku SC 246/1992</i>	236
<i>Zimbabwe Newspapers (1980) Limited Workers' Committee & Ors v Honourable Musariri, The Labour Court and Zimbabwe Newspapers (1980) Ltd SC 78/2006</i>	418
<i>Zimbabwe Newspapers (1980) Ltd v Ndlovu</i>	
2000 (1) ZLR 127 (S)	148, 399
<i>Zimbabwe Open University v Gideon Magaramombe & Deputy Sheriff Harare NO SC 20/2012</i>	375
<i>Zimbabwe Republic Police Board of Trustees v Manyangadze</i>	
2005 (2) ZLR 38 (S)	121
<i>Zimbabwe Revenue Authority v Mpindiwa</i>	
2007 (2) ZLR 49 (S)	184
<i>Zimbabwe Sun Hotels (Pvt) Ltd v Lawn</i>	
1988 (1) ZLR 143 (S)	38, 64, 253, 261
<i>Zimbabwe Teachers Association & Others v Minister of Education and Culture</i>	
1990 (2) ZLR 48 (H)	247, 438, 486
<i>Zimbabwe Teachers' Association & Ors v Chairman, Public Service Commission & Ors</i>	
1996 (1) ZLR 91 (H)	477
<i>Zimbabwe Tourist Investment Company v Ernest Gwinyai SC 150/1995</i>	156
<i>Zimnat Insurance Co Ltd v Chawanda</i>	
1990 (2) ZLR 143 (S)	500
<i>Zimnat Insurance Company Limited v George Dube & Musa Chasi SC 46/1997</i>	179
<i>Zimnat Life Assurance Limited v George Dikinya SC 30/2010</i>	48, 238, 239
<i>Zimnat Life Assurance Ltd v Dikunye</i>	
2008 (2) ZLR 200 (S)	419
<i>Zimpak (Pvt) Ltd v Mugarabi SC 196/1994</i>	163
<i>Zimpost (Pvt) Ltd v Communications and Allied Workers' Union</i>	
2009 (1) ZLR 334 (S)	117, 462, 465

<i>Zindoga & Ors v Minister of Public Service, Labour and Social Welfare & Anor 2006 (2) ZLR 10 (H)</i>	217, 222
<i>ZISCO v Dube and Ors 1997 (2) ZLR 172 (S)</i>	186, 187
<i>Zulu v Sterling Products International Limited 1988 (2) ZLR 110 (H)</i>	119
<i>ZUPCO v Chisvo 1999 ZLR 67 (S)</i>	238
<i>ZUPCO v Daison 2002 (2) ZLR 628 (S)</i>	246, 257, 258, 267
<i>ZUPCO v Mabande & Anor 1998 (2) ZLR 150 (S)</i>	138
<i>Zvoma v Amalgamated Motor Corporation (Pvt) Ltd 1988 (1) ZLR 60 (H)</i>	232
<i>Zvoma v Moyo NO & Ors 2012 (1) ZLR 117 (H)</i>	476

RHODESIA

B

<i>Beretta v Rhodesia Railways Ltd 1947 (2) SA 1075 (SR)</i>	55
<i>Beretta v Rhodesia Railways Ltd 1947 SR 48; 1947 (2) SA 1075 (SR)</i>	88, 89
<i>Bulawayo Municipality v Bulawayo Indian Sports Ground Committee 1955 SR 114; 1956 (1) SA 34 (SR)</i>	93
<i>Burnett v Standard Tobacco Co Ltd 1957 R & N 508 (SR)</i>	62, 137

G

<i>Gould v Lewis 1913 SR 66</i>	40
---------------------------------	----

H

<i>Harawa v Bossman N.O. & Another 1972 (2) RLR 118</i>	486
---	-----

R

<i>R v Van Breda 1933 SR 42</i>	65, 88
<i>Rashayi v Bakasa African Council 1978 RLR 389 (A)</i>	56
<i>Rashayi v Bakasa African Council 1978 RLR 389 (A)</i>	120
<i>Rhodesia Milling Co (Pvt) Ltd v Super Bakery (Pvt) Ltd 1973 (2) RLR 145; 1973 (4) SA 436</i>	58

S

S v Collett 1978 (3) SA 206 (SR); 1978 RLR 205 (A) 65, 88

T

Tiopaizi v Bulawayo Municipality 1923 AD 317 93

SOUTH AFRICA

3

3M SA (Pty) Ltd v SACCAWU & Others [2001]
5 BLLR 483 (LAC) 457

A

*Aaron's Whale Rock Trust v Murray and Roberts Ltd
and Another* 1992 (1) SA 652 258

*Adcock Ingram Critical Care v Commission for
Conciliation, Mediation and Arbitration & Others*
(2001) 22 ILJ 1799 (LAC) 312

Administrator, Transvaal v Traub 1989 (4) SA 731 (A) 102

Administrator, Transvaal v Zenzile 1991 (1) SA 21 (A) 478

Airlines (Pty) Ltd v Roediger and another 2008 (1) SA 293 (W) 233

*Amalgamated Clothing & Textile Workers' Union v
Veldspan Ltd* 1994 (1) SA 162 (A) 382

*Atlantis Diesel Engines (Pty) Ltd v National Union
of Metalworkers of SA* "(1994) 15 ILJ 1247 (A) 229

B

Baker v Union Government 1930 TPD 120 68

Bedford v Uys 1971 (1) SA 549 (C) 269

Benoni Produce & Coal Co Ltd v Gundelfinger 1918 TPD 453 326

Bon Accord Irrigation Board v Braine 1923 AD 480 88

Boxer Superstores Mithatha & another v Mbenya (2007)
8 BLLR 513 (SCA); (2007) 28 ILJ 2209 (SCA) 10

Boyd v Stuttaford & Co 1910 AD 101 64, 88, 89

<i>Brown v Sessell</i> 1908 TS 1137	251
<i>BTR Dunlop v National Union of Metal Workers' of SA</i> (1990) 11 ILJ 143 (IC)	49

C

<i>Carsteins v Ferreira</i> 1954 (4) SA 704 (T)	70
<i>Clark v Denny</i> (1884) 4 EDC 300	89
<i>Coin Security (Cape) (Pty) Ltd v Vukani Guards and Allied Workers' Union & others</i> 1989 (4) SA 234 (C)	55, 64
<i>Colonial Mutual Life Assurance Society Ltd v MacDonald</i> 1931 AD 412	26
<i>Consolidated Frame Cotton Corporation v The President, Industrial Court & others</i> 1986 (3) SA 786 (A)	63
<i>Coolair Ventilator Co (SA) (Pty) Ltd v Liebenberg</i> 1967 (1) SA 686 (T)	57
<i>Coopers & Lybrand and Others v Bryant</i> 1995 (3) SA 761(AD); [1995] 2 All SA 635 (A)	342
<i>Cotler v Variety Travel Goods (Pty) Ltd and Others</i> 1974 (3) SA 621 (A)	92
<i>Council for Scientific and Industrial Research v Fijen</i> 1996 17 ILJ 18 (A)	92
<i>Crawford v Tommy</i> 1906 TS 843	93
<i>Cuppan v Cape Display Supply Chain Services</i> 1995 (4) SA 175	167

D

<i>Dabner v SAR and H</i> 1920 AD 583	167
<i>de Vos v Monnik & Visser</i> 1944 CPD 30	93

E

<i>East London Municipality v Thomson</i> 1944 AD 56	64, 69
<i>East Rand Gold & Uranium Co Ltd v National Union of Mineworkers</i> (1989) 10 ILJ 683 (LAC)	333
<i>Estate van der Byl v Swanepoel</i> 1927 AD 141	82
<i>Ex parte Chairperson of the Constitution Assembly:</i>	

<i>In re Certification of the Constitution of the RSA, 1996</i> <i>(1996) 17 ILJ 821 (CC)</i>	435
--	-----

F

<i>Faberlan v McKay & Fraser 1920 WLD 23</i>	63
<i>Farmers Co-operative Society v Berry 1912 AD 343</i>	232
<i>Feldman (Pty) Ltd v Mall 1945 AD 733</i>	80
<i>Food & General Workers' Unions & Others v Minister of Safety & Security & Others (1999) 20 ILJ 1258 (LC)</i>	458
<i>Food and Allied Workers' Union & Others v Kellogg SA (Pty) Ltd (1993) 14 ILJ 406 (IC)</i>	200
<i>Friedlander v Hodes 1944 CPD 169</i>	56

G

<i>Gerry Bouwer Motors (Pty) Ltd v Preller 1940 TPD 130</i>	57
<i>Gladstone v Thornton's Garage 1929 TPD 116</i>	64
<i>Gracie v Hull, Blythe & Co (SA) Ltd 1931 CPD 539</i>	93
<i>Grundling v Beyers 1967 (2) SA 131 (W)</i>	231

H

<i>Harrismith Building Society v Taylor 1938 OPD 36</i>	57
<i>Harvey Tiling Co (Pty) Ltd v Rodomac (Pty) Ltd 1977 (1) SA 316 (T)</i>	57
<i>Hirsh Appliance Specialists v Shield Security Natal (Pty) Ltd 1992 (3) SA 643 (D)</i>	85
<i>Hlongwane and another v Plastix (Pty) Ltd (1990) 11 ILJ 171 (IC)</i>	203
<i>Hoffman v Monis Wineries Limited 1948 (2) SA 163 (C)</i>	56

I

<i>ISEP Structural Engineering and Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd 1981 (4) SA 1 (A)</i>	269
--	-----

J

<i>Jamieson v Elsworth 1915 AD 115</i>	62, 64, 76
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<i>Johannesburg Municipality v O'Sullivan</i> 1923 AD 201	54, 64
<i>Jones v East Rand Extension Gold Mining Co</i> 1963 TH 325	57
<i>Jooste v Score Supermarkets Trading (Pty) Ltd</i> 1999 (2) SA 1 (CC)	491

K

<i>Ketteringham v Cape Town City Council</i> 1933 CPD 316	57
<i>Kinemas Ltd v Berman</i> 1932 AD 246	63
<i>Kubheka v Imextra (Pty) Ltd</i> 1975 (4) SA 484 (W)	231

L

<i>Law Society of the Transvaal v Tloubatla</i> 1999 (11) BCLR 1275 (T)	275
<i>Legg & Co v Premier Tobacco Co</i> 1926 AD 132	326

M

<i>Magawo v Caledon Divisional Council</i> 1972 (3) SA 365 (C)	55
<i>Magna Alloys & Research (SA) (Pty) Ltd v Ellis</i> 1984 (4) SA 874 (A)	59
<i>Martin v De Kock</i> 1948 (2) SA 719 (A)	64
<i>Masetlha v President of the Republic of South Africa and Another</i> 2008 (1) SA 566 (CC); 2008 (1) BCLR 1	233
<i>McLean v Rischman</i> 1914 CPD 731	65
<i>Media Workers' Association of South Africa & Ors v Press Corporation of South Africa Ltd ('Perskor')</i> 1992 (4) SA 791 (A)	419
<i>Medical Association of South Africa v Minister of Health</i> [1997] BLLR 562 (LC)	29
<i>Metal and Allied Workers' Union v Hart Ltd</i> (1985) 6 ILJ 478 (IC)	320
<i>Middleton v Carr</i> 1949 (2) SA 374 (A)	65
<i>Mine Workers' Union v Broderick</i> 1948 (4) SA 959 (A)	57
<i>Minister of Justice v Khoza</i> 1996 (1) SA 410 (A)	493
<i>Mkize v Martens</i> 1914 AD 382	81
<i>Moonian v Balmoral Hotel</i> 1925 NPD 215	61
<i>Mostert NO v Old Mutual Life Assurance Co (SA)</i>	

<i>Ltd 2001 (4) SA 159 (SCA)</i>	270
<i>Murray v Minister of Defence (2008) 6 BLLR 513 (SCA)</i>	480
<i>Myburgh v Danielskuil Munisipaliteit 1985 (3) SA 335 (NC)</i>	232
<i>Myers v Abramson 1952 (3) SA 121 (C)</i>	251, 255
<i>Myers v Sieradzki 1910 TPD 869</i>	55

N

<i>National Chemsearch (SA) (Pty) Ltd v Borrowman</i>	
1979 (3) SA 1092 (T)	61
<i>National Education Health & Allied Workers' Union v</i>	
<i>University of Cape Town and Others 2003 (3) SA 1</i>	
<i>(CC); 2003 (2) BCLR 154</i>	249
<i>National Union Metalworkers of SA v Vetsak</i>	
<i>Co-operative Ltd and Others (1991) 12 ILJ 564 (LAC)</i>	438
<i>National Union of Metalworkers of South Africa</i>	
<i>v Vetsak Co-Operative Ltd and others 1996 (4) SA 577 (A)</i>	248
<i>National Union of Textile Workers' v Stag Packagings</i>	
<i>(Pty) Ltd and Another 1982 (4) SA 151 (T)</i>	232
<i>Ndamase v Fyfe-King NO 1939 EDL 259</i>	56
<i>Negro v Continental Spinning & Knitting Mills 1954</i>	
<i>(2) SA 203 (W)</i>	54
<i>NEHAWU v University of Fort Hare (1997) 8 BLLR</i>	
<i>1054 (LC)</i>	229
<i>Ngwewu & Others v Union-Cooperative Bark & Sugar</i>	
<i>Co Ltd 1982 (4) SA 390 (N)</i>	55
<i>NTE Ltd v SACWU 1990 (2) SA 499 (N)</i>	437
<i>Ntuli & Others v Hazelmores Group (1988) 9 ILJ 709</i>	49
<i>NUMSA & Others v Comark Holdings (Pty) Ltd</i>	
<i>(1997) 5 BLLR 589 (LC)</i>	230

O

<i>O'Connell v Fischman 1948 (4) SA 191 (T)</i>	64
<i>Old Mutual Assurance Co SA Ltd v Gumbi (2007) 8</i>	
<i>BLLR 699 (SCA)</i>	10

P

<i>Peters, Flamman and Co v Kokstad Municipality</i> 1919 AD 427	88
<i>Picardi Hotels Ltd v Food & General Workers' Union & Others</i>	470
<i>Premier Medical & Industrial Equipment (Pty) Ltd v Winkler & another</i> 1971 (3) SA 866 (W)	56
<i>Prins v Universiteit van Pretoria</i> 1980 (2) SA 171 (T)	54

R

<i>R v AMCA Services Ltd & Anor</i> 1959 (4) SA 207 (A)	26
<i>R v Smit</i> 1955 (1) SA 239 (C)	55, 438
<i>Rand Tyres and Accessories (Pty) Ltd and Appel v Industrial Council for the Motor Industry Transvaal</i> 1941 TPD 108	336
<i>Redman v Colbeck</i> (1917) EDL 35	40
<i>Rens v Coltman</i> 1996 (1) SA 452 (A)	270
<i>Roffey v Catterall, Edwards & Goudre (Pty) Ltd</i> 1977 (4) SA 494 (N)	60
<i>Rumbles v Kwa Bat Marketing (Pty) Ltd</i> [2003] 8 BLLR 811(LC)	31
<i>Rustenburg Town Council v Minister of Labour</i> 1942 TPD 220	93

S

<i>S v Dzukuda & others; S v Tshilo</i> 2000 (2) SACR 443 (CC)	249
<i>S v Tshilo</i> 2000 (4) SA 1078 (CC); 2000 (11) BCLR 1252 (CC)	249
<i>SA Rugby (Pty) Ltd v CCMA & Ors</i> [2006] 1 BLLR 27 (LC); (2006) 27 ILJ 1041 (LC)	103
<i>SACTWU and another v Cadema Industries (Pty) Ltd</i> [2008] 8 BLLR 790 (LC)	103
<i>Santos Professional Football Club (Pty) Ltd v Igesund</i> 2003 (5) SA 73 (C)	233
<i>Sappi Fine Papers (Pty) Ltd v Pienaar NO & Others</i> (1994) 15 ILJ 137 (LAC)	473
<i>Schierhout v Minister of Justice</i> 1926 AD 99	231
<i>Schlegemann v Meyer Bridgens & Co Ltd</i> 1920 CPD 494	89
<i>Schoeman & Another v Samsung Electronics SA (Pty) Ltd</i>	

<i>(1997) 10 BLLR 1364 (LC)</i>	472
<i>Seloadi and Others v Sun International (Bophuthatswana)</i>	
<i>Ltd 1993 (2) SA 174 (B)</i>	233
<i>Smit v Workmen's Compensation Commissioner 1979</i>	
<i>(1) SA 51 (A)</i>	27, 54, 61, 63
<i>South African Defence Force v Minister of Defence & Others, Minister of Defence and Others v SA National Defence Union & Others (2006) 27 ILJ 2276 (SCA)</i>	329
<i>South African National Defence Union v Minister of Defence 1999 (4) SA 469 (CC)</i>	281
<i>South African National Defence Union v Minister of Defence and Others [2007] 9 BLLR 785 (CC); (2007) 28 ILJ 1909 (CC)</i>	329
<i>South African Railways and Harbours v Marais 1950 (4) SA 610 (AD)</i>	82
<i>South African Rugby Players Association (SAPRA) and Others v SA Rugby (Pty) Limited and Others; SA Rugby (Pty) Limited v South African Rugby Players Union and Another [2008] 9 BLLR 845 (LAC)</i>	103
<i>Steel, Engineering & Allied Workers' Union of SA & Others v Trident Steel (Pty) Ltd (1986) 7 ILJ 86 (IC)</i>	55
<i>Stewart Wrightson (Pty) Ltd v Thorpe 1974 (4) SA 67 (D); 1977 (2) SA 943 (A)</i>	63
<i>Stewart Wrightson (Pty) Ltd v Thorpe 1977 (2) SA 943 (A)</i>	232
<i>Stoop v Lichtenburg Town Council 1952 (2) SA 72 (T)</i>	231
<i>Strachan v Lloyd Levy 1923 AD 670</i>	88
<i>Strachan v Prinsloo 1925 TPD 709</i>	90

T

<i>Tshabalala & Others v Minister of Health & Welfare (1986) 7 ILJ 168 (W)</i>	232
--	-----

U

<i>Union Government v Vianini Ferro Chrome Concrete Pipes (Pty) Ltd 1941 AD 43</i>	343
--	-----

<i>United African Motor & Allied Workers' Union & others v Fodens (SA) (Pty) Ltd (1983) 4 ILJ 212 (IC)</i>	77
--	----

V

<i>Van Deventer v Workmen's Compensation Commissioner 1962 (4) SA 28 (T)</i>	68
<i>Vanadium Technology (Pty) Ltd v National Union of Mineworkers & Others (1997) 18 ILJ 740 (LC)</i>	473
<i>Victoria Falls and Transvaal Power Co Ltd v Consolidated Longlaagte Mines Ltd 1915 AD 1</i>	269
<i>Vraund v Baker & Co (1905) 19 EDC 54</i>	40

W

<i>Wallace v Rand Daily Mails Ltd 1917 AD 479</i>	56
<i>Willenburg v Pickstone & Brother Ltd 1922 CPD 13</i>	251
<i>Woods v Walters 1921 AD 303</i>	269

Z

<i>Zieve v National Meat Supplies Ltd 1937 AD 192</i>	62, 92
---	--------

UNITED KINGDOM

B

<i>Brace v Calder [1895] 2 QB 253 (CA)</i>	49
--	----

C

<i>Cluston & Co Ltd v Carry [1906] AC 122</i>	136
<i>Collier v Sunday Referee Publishing Company Ltd [1940] 4 All ER 234, [1940] 2 KB 647</i>	63
<i>Collymore v Attorney General [1970] AC 538 (PC); (1967) 12 WLR 172 (T&T CA)</i>	433
<i>Council of Civil Service Unions v Minister for the Civil Service [1985] 1 AC 374; [1984] 3 All ER 935</i>	102, 477
<i>Council of Civil Service Unions v Minister of the Civil Service [1984] 3 All ER 935</i>	102

<i>Crofter Hand Woven Harris Tweed Co Ltd v Veitch</i> [1942] AC 435	428
---	-----

D

<i>Devonald v Rosser & Sons Ltd</i> [1906] 2 KB 728 (CA)	52
<i>Dundee General Hospital Board of Management v</i> <i>Walter & Anor</i> [1952] 1 All ER 896	501
<i>Dunk v George Waller & Son Ltd</i> [1970] 2 QB 163; [1970] 2 All ER 630; [1970] 2 WLR 1241	46
<i>Dunn v The Queen</i> [1896] 1 QB 116	477

E

<i>Esso Petroleum Co Ltd v Harper's Garage (Stourport)</i> <i>Ltd</i> [1967] 1 All ER 699; [1968] AC 269; [1967] 2 WLR 871	58
---	----

G

<i>Great Western Railway Co. v Bater</i> [1920] 3 KB 266	47
--	----

H

<i>Harmer v Cornelius</i> [1843-60] All ER Rep. 624	56
<i>Herbert Morris Ltd v Saxelbv</i> [1916] 1 AC 688	59
<i>Hudson v Ridge Manufacturing Co Ltd</i> [1957] 2 QB 348, [1957] 2 All ER 229	68

J

<i>Johnstone v Bloomsburg Health Authority</i> [1992] 1 QB 333, [1991] 2 All ER 293 (CA)	69
---	----

L

<i>Lee v Lee's Air Farming Limited</i> [1961] AC 12	47
<i>Leesh River Tea Co Ltd & Ors v British India Steam</i> <i>Navigation Co Ltd</i> [1966] 3 All ER 593 (CA)	84
<i>Lewis v Salisbury Gold Mining Company</i> [1984] 1 QB 1	80
<i>Lister v Romford Ice & Cold Storage Co Ltd</i> [1957] AC 555; [1957] 2 WLR 158; [1957] 1 All ER 125; [1956] 2 <i>Lloyd's Rep.</i> 505	56, 145

M

- Mason v Provident Clothing & Supply Co Ltd* [1913] AC 724 (HL) 58
Morris v Martin & Sons Ltd [1966] 1 QB 716 (CA) 83, 84

N

- Nokes v Doncaster Amalgamated Collieries Ltd* [1940] AC 1014 49
Nordenfelt v The Maxim Nordenfelt Guns & Ammunition Co. [1894] AC 535 58

P

- Pearce v Foster* (1886) 17 QBD 536 136
Pett v Greyhound Racing Association Ltd [1968]
1 QB 125; [1968] 2 All ER 545; [1968] 2 WLR 1471 168
President of the Methodist Conference v Parfitt [1984] QB 368 48

R

- Re Rubel Bronze and Metal Co and Vos* [1918] 1 KB 322 260
Rogers v Booth [1937] 2 All ER 751 48

S

- Shirlaw v Southern Foundries (1926) Ltd* [1939] 2 KB 206,
[1939] 2 All ER 113 (CA) 51
Sinclair v Neighbour [1967] 2 QB 279, [1966] 3 All ER
988, [1967] 2 WLR 1 57

UNITED STATES

A

- Abood v Detroit Board of Education* 431 US 209 (1977) 275, 280

B

- Brandenburg v Ohio* 395 US 444 (1969) 276

N

- NAACP v Alabama* 357 US 449 (1958) 275

S

Smith v Allwright 321 US 649 (1944) 277

T

Terry v Adams 345 US 461 (1953) 277

CANADA

L

Lavigne v OPSEU (1991) 81 DLR (4th) 545 (Canada) 275, 280

R

*Re Retail Wholesale Union and Department Store Union,
Locals 544, 496, 635 and 955 and Government of
Saskatchewan* (1985) 19 DLR (4th) 609 (SK C.A) 428, 432

OTHER

A

Associated Tyre Specialists (Eastern) Ltd v PA Waterhouse
[1976] IRLR 386 63

B

Barwick v English Joint Stock Bank (1867) L.R. 2 Ex 259 85
Brown v Sessell 1908 TS 1137 251

C

C H Giles & Co Ltd v Morris [1972] 1 WLR 307 232
Chapel v Times Newspapers [1975] 1 WLR 482 232, 233
Cheall v United Kingdom No. 10550/83 (1985) 42 DR 178 274
Claygate v Batchelor (1602) Owen 143 58
Council for Civil Service Unions and Others v
United Kingdom No.11603/85 50 228 (1987) 280
Crawford v Tommy 1906 TS 843 93

D

<i>Davies v Presbyterian Church of Wales</i> (1986) IRLR 194; [1986] ICR 280	48
<i>De Francesco v Barrum</i> (1890) ChD 430	232

E

<i>East Lindsay District Council v Daubney</i> 1977 ICR 566, 1977 IRLR 181	105
---	-----

F

<i>Faccenda Chicken Ltd v Foulter</i> [1986] IRLR 69; [1987] Ch 117	57, 59
<i>Ferguson v John Dawson & Partners (Contractors) Ltd</i> [1976] 1 WLR 1213; [1976] 3 All ER 817	30

H

<i>Hall (Inspector of Taxes) v Lorimer</i> [1994] IRLR 171	27
<i>Hilton International Hotels (UK) Ltd v Protopapa</i> [1990] IRLR 316	101
<i>Hivac Ltd v Park Royal Scientific Instruments Ltd</i> [1946] Ch 169	57
<i>Hooper v British Railway Board</i> [1988] IRLR 517 CA	105

I

<i>Isaacson v Walsh & Walsh</i> (1903) 20 SC 569	49
--	----

K

<i>Katsikas v Konstandinidis</i> [1993] IRLR 179	49
<i>Keppel Bus Co Ltd v Sa'ad bin Ahmad</i> [1974] 1 WLR 1082	85

L

<i>Lavis v France</i> No. 14223/88 70 DR 218 (1991)	276
<i>Laws v London Chronicle (Indicator Newspapers) Ltd</i> 1959 1 WLR 698	61
<i>Lesney Products & Co Ltd v Nolan</i> [1974] ICR 170 (CA)	196

M

<i>Massey v Crown Life Assurance Co. [1978] ICR 590,</i> <i>[1978] IRLR 31 CA</i>	31
<i>Mcfedey v United Kingdom No. 8317/78 20 DR 44</i>	276

N

<i>National Union of Belgian Police v Belgium (1975) 1</i> <i>EHRR 518</i>	278
---	-----

R

<i>Ryan v Mutual Tontine Westminster Chambers Association</i> <i>[1893] 1 Ch 116</i>	232
<i>Robinson v Crompton Parkinson [1978] IRLR 61 [1978] ICR 401</i>	63
<i>Rustenburg Platinum Mines Ltd v South African Airways</i> <i>and Pan American World Airways Inc. 1979 Lloyd's Rep</i> <i>19 (C.A.)</i>	84

S

<i>Sagar v H. Redehalg & Son Ltd [1930] 2 Ch 117</i>	52
<i>Schmidt and Dahlstrom v Sweden (1976) 1 EHRR 632</i>	278
<i>Secretary of State for Employment v ASLEF (No 2) [1972] ICR 19</i>	63
<i>Sibson v United Kingdom (1993) 17 EHRR 193</i>	279
<i>Sigurdur A. Sigurjonsson v Iceland (1993) 16 EHRR 462</i>	279
<i>Stevenson, Jordan and Harrison Ltd v McDonald and</i> <i>Evans [1952] 1 TLR 101 (CA); (1952) 69 RPC 10</i>	27
<i>Swedish Engine Drivers Union v Sweden (1976) EHRR 617</i>	278
<i>System Floors (UK) Ltd v Daniel [1982] ICR 228; [1981] IRLR 475</i>	31

W

<i>Walker v Northumberland County Council [1995] IRLR 35</i>	69
<i>Wynes v Sonthrepps Hall Broiler Farm Ltd [1968] ITR 407</i>	196

Y

<i>Young and Woods Ltd v West [1980] IRLR 201</i>	30
<i>Young, James & Webster v United Kingdom (1982) 4 EHRR 38</i>	275

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This is a comprehensive textbook on Zimbabwean labour law. After detailing the history and purpose of the law, it offers a comprehensive review of contracts of employment, termination, the rights of organization and association, and collective bargaining. Dispute settlement is discussed within the contexts of the right to strike, conciliation and arbitration, and the role of the courts in adjudication.

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CONTENTS: Ch. 1: Definition, Purpose and Sources of Labour Law; Ch. 2: History of Labour Law; Ch. 3: The Contract of Employment: Formation and Operation; Ch. 4: Contract of Employment: Rights and Obligations of the Parties; Chs. 5-9: Termination of Employment; Ch. 10: Freedom of Association and the Right to Organize; Ch. 11: Collective Bargaining; Chs. 12-14: Dispute Settlement; Ch. 15: State Employment; Ch. 16: Some Aspects of Social Security; Ch. 17: International Labour Law. Appendices.

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